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A TREATISE

ON

The Law

RELATING TO

BANKERS AND BANKING.

BY

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set of circumstances, will be enabled readily to observe and to decide whether the principles and rules stated under the head to which his difficulty belongs, have been applied to, or deduced from, circumstances the same as, or analogous to, those of his particular case, and whether the reasons assigned by the court meet the difficulty and govern the case.

In order to render the Treatise more widely available for every-day reference, the rules, suggestions, cautions, &c., for the conduct of bankers, which the author has thought it desirable to interpose, while they have been immediately derived, in all cases, from the observations of the judges in law and in equity, have been—as it is hoped will be found—as much as possible expressed in the language of business, divested of legal technicalities, and adapted for the probable requirements of practical men.

It may be objected that the plan of this work is incomplete, for not treating, separately and specifically, the subject of the law relating to the Bank of England. The answer is, that law is spread over several hundreds of statutes—the titles alone of these statutes fill about 200 pages of the statute book;—an adequate statement of it would have occupied, even in a condensed form, a space sufficient to have probably doubled, at the lowest estimate that could be formed, the bulk of this volume; while the whole of that additional matter would have been found quite useless for the general purposes of those for whom the work is designed, being only serviceable to such persons as might wish to ascertain the relations of the Bank of England to the Government, in respect of the management and other details concerning the national debt, loans, &c. Now, on these subjects it would be impossible to present the law in a shape at once compendious and useful; every one with experience in such matters knows, that in practice no result that is satisfactory can be had, except by recourse to the words of the statutes themselves, viewed in connection as a whole. For these reasons, it has been decided not to attempt dealing with this branch of the law relating to the Bank of England; what has been attempted on this head is to present a full view of the law, whether contained in statutory enactments or in judicial decisions—in the first case in the very language of parliament—as it relates to the monopoly of the Bank of England, in its bearings upon the rights and liabilities of the banking interest throughout the country, together with all such matters connected with government, and bank, stock, &c.,^(a) and the practice, on various points, of the Bank of England, &c., as bankers and their customers are entitled to expect they shall find information upon, in a work of this nature.

A summary view of the legislation respecting the Bank of England and its monopoly is not without its interest, and will be found sufficiently useful as an introduction to many of the subjects treated in the following pages to justify insertion here.

(a) For an account of the Stock Exchange and the regulations of the Stock Exchange Committee, see Ayres's *Fund on English and Foreign Funds, &c.*, pp. 87–110.

In 1694, parliament gave power to incorporate a body of persons as The Governor and Company of the Bank of England, who were enabled to purchase and retain lands, &c., and to alienate the same; but the corporation was only to endure until the twofold condition should be complied with, by the government, of giving a twelvemonths' notice of dissolution, at any time after 1st August, 1705, and repaying the capital borrowed from the bank. Their existence as a body politic has been prolonged, their original powers and privileges being on most occasions altered, and latterly limited, by successive statutes down to 1844, commonly known as the Bank Charter Act, under which it stands at present, liable, according to that statute, to be put an end to at any time upon twelvemonth's notice given after 1st August, 1855, and upon repayment by parliament to the bank of the sum of £11,015, 100, the debt then due from the public to the bank, &c., and upon payment to the bank of all arrears of the sum of £100,000 *per annum* (the "yearly fund"), and also upon repayment of all principal and interest which shall be due to the bank upon all such tallies, exchequer orders, exchequer bills, or parliamentary funds, which the bank shall then have remaining in their hands; such cessation of their existence, powers, &c., to take place at the expiration of the said notice. Any vote or resolution of the House of Commons, signified under the hand of the speaker in writing, is sufficient notice. Soon after the establishment of the bank, they obtained an enactment "that no other bank or any corporation, society, fellowship, or constitution, in the nature of a bank, should be erected, or established, permitted, suffered, countenanced or allowed by act of Parliament, within this kingdom."^(b) Ten years later was passed the enactment, which, with limitations from time to time, has subsisted to our own day, and which forbade any other body politic erected or to be erected, or any other persons united or to be united in covenants or partnership exceeding six persons, in England, to borrow, owe, or take up any money on their bills or notes payable at demand, or at any less time than six months from the borrowing thereof.^(c) In 1742, the privilege was again solemnly recognized by Parliament,^(d) that no other bank should be erected, established, or allowed by Parliament; and that it should not be lawful for any body politic, or for any other persons united in covenants or partnership exceeding six persons, in England, to borrow, owe or take up any money on their bills or notes payable at demand or at any less time than six months from the borrowing.

In 1781, this enactment was repeated *verbatim*,^(e) as it was in 1800.^(f) At length, in the year 1826, came a limitation of the bank's monopoly to London and a district of sixty-five miles around it, by which any body politic, erected for the purposes of banking, and any number of persons united in covenants or partnership, although exceeding the number of six, may carry on business as bankers in England, and make and issue their bills or notes at any place or places in England exceed-

(b) 8 & 9 Will. & M. c. 20.

(d) 15 Geo. 2, c. 13, s. 5.

(f) 39 & 40 Geo. 3, c. 28, s. 15.

(c) 7 Anne, c. 7, s. 61.

(e) 21 Geo. 3, c. 60, s. 12.

ing sixty-five miles from London, made payable on demand, or otherwise, at some place or places specified on the same, and may borrow, owe or take up any money on their bills or notes so made and issued at any such place, &c., provided they have no house of business, as bankers, in London, &c., &c. : and the Bank of England was enabled to erect branch banks in any part of England.(g) In 1833, however, any body politic, and any other persons united, &c., in partnership, though exceeding the number of six, in business as bankers, were allowed to make bills or promissory notes payable by an agent in London, or to draw on such agent,(h) payable on demand, or otherwise, in London, and for any less amount than £50, which they could not do before. Still, it was, the same year, enacted, that no body politic, no society, company, or persons in covenants or copartnerships, exceeding six persons, shall make or issue in London, or within sixty-five miles thereof, any bill of exchange or promissory note, or engagement for the payment of money on demand, or upon which any holder might obtain payment on demand ; but any such body might carry on business within the said limits, provided they did not borrow, owe, or take up money on their bills or notes payable on demand, or at any less time than six months from the borrowing ;(i) but then as a compensation, Bank of England notes were made a legal tender anywhere but at the Bank of England or the branches. In 1844, a new system was introduced,(k) steps were taken towards getting rid of the country bank circulation of notes, in time, by holding out inducements to bankers to cease issuing, and by prohibiting bankers who had once ceased from resuming the issue, and by prohibiting every banker who was not issuing his own notes on 6th May, 1844, to issue for the future ; it was also enacted, that any society or company, or any persons in partnership, though exceeding six, in business as bankers, in London or within sixty-five miles, may draw, accept, or indorse, bills of exchange, not being payable to bearer on demand ; and in the same year, the system of joint stock banking companies was established,(l) the system of banking copartnerships having been set up in 1826. Prior to 1826, nowhere in her Majesty's dominions, at all events nowhere in England, could more than six persons associate together for the purpose of carrying on the banking business.(m) But there never was, apparently, anything in the nature of legal restriction, to prevent private banks in London, not having more than six partners, from issuing their own notes payable to bearer ; and the historical fact is, that Goldsmith's notes, as private bank notes were then called, were issued by private bankers in London for some years after the Bank of England was established.

With respect to those comparatively new modes of carrying on the business of banking, the banking copartnerships, and joint stock banking companies, much attention has been paid, to place before the reader the law relating to them in as clear a light as possible ; the subject of di-

(g) 7 Geo. 4, c. 46.

(h) 3 & 4 Will. 4, c. 83, s. 2.

(i) 3 & 4 Will. 4, c. 98, s. 3.

(k) 7 & 8 Vict. c. 32.

(l) 7 & 8 Vict. c. 113.

(m) Lord Cranworth, V. C., 1 Sim. N. S. 234.

rectors' powers and liabilities, civil and criminal, the rights and liabilities, and remedies of shareholders, as involved on the bankruptcy, or winding up of these bodies, and also generally, it is hoped, will be found explained in as satisfactory a manner as the present state of the law admits of.

The subject of colonial banks has not been omitted, and there is subjoined a Summary View of the Law relating to Savings' Banks.

An Index of matters, which no pains has been spared to render complete, is annexed, for the purpose of rendering the volume generally accessible:—a Table of Cases decided, and another of Statutes, have been added, for the convenience of professional persons, who are accustomed to refer to law treatises by those means.

MIDDLE TEMPLE,
Nov. 18, 1856.

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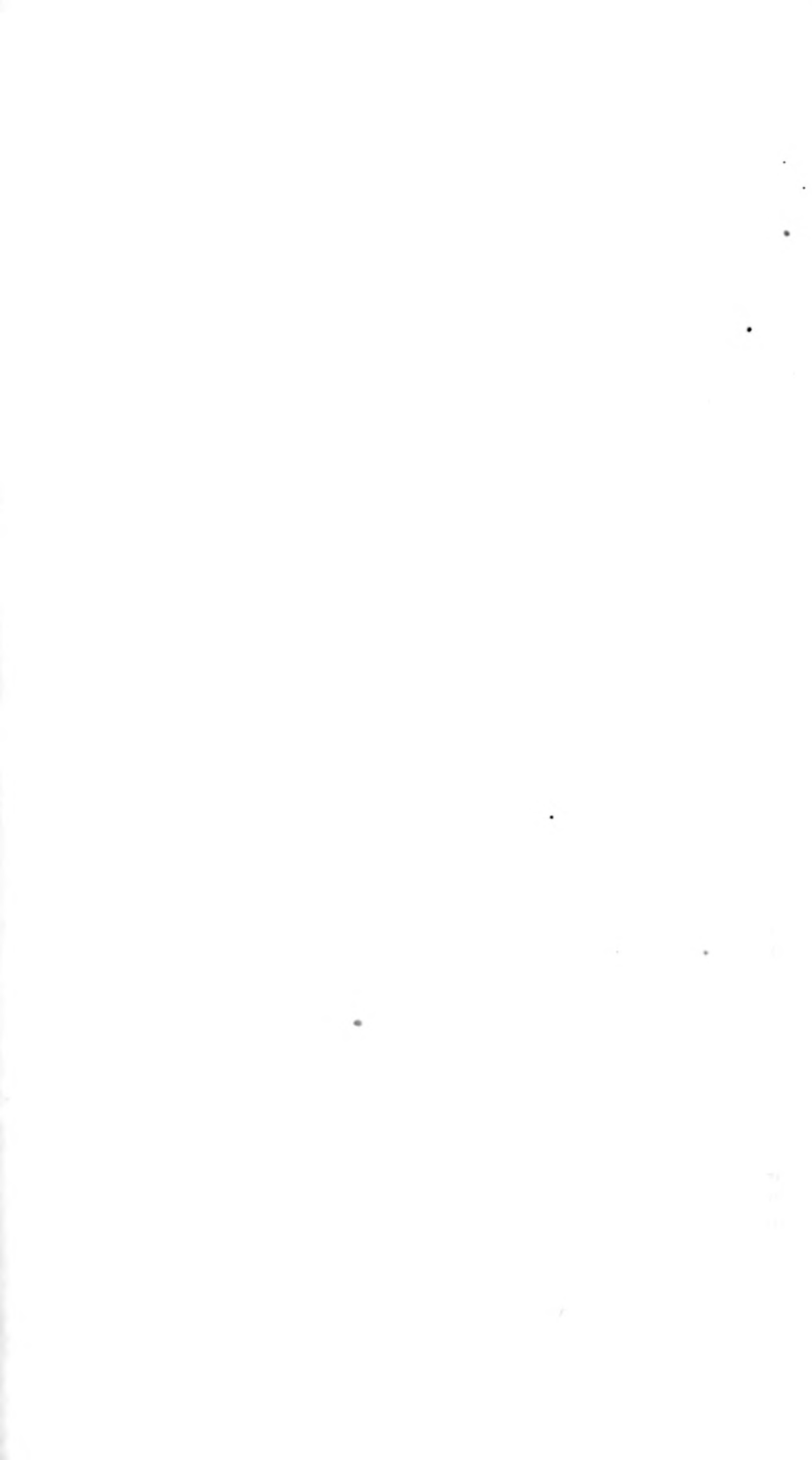
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A TREATISE

ON

THE LAW RELATING TO BANKERS.

CHAPTER I.

RELATION BETWEEN BANKER AND CUSTOMER.

THE ordinary relation between banker and customer is this: the customer opens an account with the banker by paying a sum of money into the bank, the banker undertaking to hold himself liable for the payment of a like sum to the customer's use, either paying interest on the money or not, as the course of business of the bank or the special arrangements between the banker and the individual customer may be, and also agreeing to honour or cash any cheques, or orders for the payment of any sums of money, which the customer may send to him, during business hours, to the extent of the sum deposited.

A less ordinary, but still a not uncommon, relation between banker and customer is, that the banker makes advances to the customer or allows him to overdraw his account, charging interest on the advances, and in most cases requiring a deposit of securities, or obtaining the guarantee of some third person, for the repayment of such advances, with interest, &c.; and whilst such accommodation continues the former relation of the parties is of course inverted.

But neither of these relations partakes of a fiduciary character, nor bears analogy to the relation between principal *and factor or agent, who is *quasi* trustee for the principal with respect to the [*2] particular matter for which he was appointed factor or agent.

Money paid into a bank ceases altogether to be the money of the person paying it in; it is the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. (a) To all intents it is the money of the banker to do as he pleases with; though, it is true that, in a popular sense, it is spoken of as "my money at my banker's;" "my balance at my banker's;" and

(a) *Foley v. Hill*, 2 H. L. Cas. 36.

though no one can doubt that in ordinary language "ready money" includes the speaker's balance at his banker's. Accordingly, many decisions have been made construing phrases occurring in wills, of this description, to carry sums standing in a banker's books to the credit of the testator.

This, looking at all the terms of a will, has been held to be the extent of a bequest of "all my ready money." (b)

So money at a banker's, placed to the trade account of a trader, has been construed to pass in his will under "all my stock in trade." (c)

Or the balance in a testator's favour at his banker's may be included under the expression "all my debts," and pass accordingly. (d)

Or the balance at a banker's may pass as "money in hand." (e)

So the balances at testator's banker's upon a current account, and also upon a deposit account, where deposit notes or vouchers were given by the bank as a security for the money, the balance carrying interest and considered as money at the disposal of the depositor, and as readily accessible *by him as money in an ordinary account current, were [*3] both held to pass under "all my moneys." (f)

But still the legal relation of banker and customer, in their ordinary dealings in money, is purely and simply that of debtor and creditor respectively. Money paid into a banker's is merely a common law debt, and cannot be got out again by means of a bill in equity, there being nothing of a fiduciary character in the connection between the parties. (g)

And it seems that the statute of limitations runs against this debt as against any other simple contract debt, and consequently bankers, with whom money has been deposited, might insist, if there had never been any payment into the account subsequently to the first deposit, and no settlement with the customer, that they had never promised to pay the balance within six years, &c., and that might be a good defence at law. (h)

If bankers were trustees of money of their customers in their hands this must follow, that notice to them of the drawer having assigned to the payee of a cheque an interest in so much of the drawer's money would, *of itself*, bind the bankers to pay to the payee or bearer, and give

(b) *Parker v. Marchant*, 1 Phill. Ch. R. 356.

(c) *Stuart v. Earl of Bute*, 3 Ves. 217, 218.

(d) *Carr v. Carr*, 1 Meriv. 541, n.; see 1 Phill. 361.

(e) *Vaisey v. Reynolds*, 5 Russ. 12; supported 1 Phill. 362; see *Boggs v. Morgan*, 9 Sim. 289; affirmed, 3 My. & C. 661. See also *Hill v. Mason*, 2 Jac. & W. 248; *Taylor v. Taylor*, 1 Jur. 401.

(f) *Manning v. Purchell*, 2 Sm. & G. 292.

(g) *Foley v. Hill*, 2 H. L. Cas. 39, 42, 45. A banker as a witness is bound to answer what the balance of a party to a cause was on a given day, as the knowledge does not come to him in the nature of a confidential or privileged communication. *Loyd v. Freshfield*, 2 Car. & P. 325.

(h) *Foley v. Hill*, 1 Phill. 401, 405. It is no breach of contract to pay interest on money deposited, that the banker had not regularly entered the interest in his books, the money having been suffered to lie in his hands for eight years. *Foley v. Hill*, 2 H. L. Cas. 40. The usage of bankers by which they charge interest on advances made to customers has been expressly sanctioned by the courts. *Colly. Partnersh.* 231.

the payee or bearer, on non-payment, a right of suit in equity or of action at law against the bankers.⁽ⁱ⁾ But *the law* is not so; for it has been expressly decided that money deposited with bankers to be paid to a third person is not money had and received to the use of that person until the bankers have bound themselves *to pay it over.^(k) The debt until then remains between them and the customer; so that in case of [*4] non-payment to his order the customer is the proper party to sue, and, as will be seen, may recover substantial damages for the injury, always assuming that his account at the time shows a sufficient balance in his favour. The customer has also the right of ordering the banker to carry his balance, or any part of it, to any other account kept with the banker by any other person, and this may be effectually done either by a cheque or order in writing or orally, though a formal mode is usually adopted.^(l) It is of the nature and essence of the transactions between banker and customer that the latter, having a balance in his favour, shall be able to command payment at sight.^(m)

But although there is nothing in this ordinary relation to constitute the banker a trustee, he may, of course, by agreement, take upon himself the character of agent, or make himself a trustee towards a *cestui que trust*; for example, if a customer deposits exchequer bills with a banker, and he undertakes to receive the interest upon them, or undertakes to negotiate or make sale of them, and to credit the customer's account with the proceeds of the sale, in this case it is obvious he is in the position of trustee, and partly, at least, sustains a fiduciary character; but this service may or may not be appended to his employment of banker; his trade of banker is totally independent of it; his trade of banker consists of the general trade, to which the other is an accidental addition.⁽ⁿ⁾

*So when the banker receives money to invest in stocks, or receives orders to appropriate the customer's balance, or a specified [*5] part of it, to any specified purpose, and assents, or does not repudiate the orders, he is in the situation of a trustee or agent with reference to that money, &c.

It might be supposed, indeed, to be a very simple and obvious conclusion to arrive at, and one that required the least possible investigation in order to satisfy all who turn their attention to such matters, that the relation of banker and customer is the relation of debtor and creditor. But this has not proved to be the case, and that notwithstanding it is to be found laid down in times previous to the introduction of banking

(i) *Dearle v. Hall*, 3 Russ. 1; adopted, *Watts v. Porter*, 1 Jur. (N. S.) 133, Q. B. See *infra*, 24, n. (x).

(k) *Malcolm v. Scott*, 5 Exch. 610; see 6 Hare, 570.

(l) *Watts v. Christie*, 11 Beav. 551; see 2 B. & A. 42.

(m) 11 Beav. 546.

(n) Per Lord Brougham in *Foley v. Hill*, 2 H. L. Cas. 44. But a bill for an account held to lie against a banker by his customer. See *Bowles v. Orr*, 1 Y. & Coll. 464. All receipts given by bankers for money received, which shall entitle or be intended to entitle the person paying the money or the bearer of such receipts to receive the like sum from any third person are chargeable with stamp duty. See 3 Welsby and Beavan's Statutes, 1259.

into this country, that generally if *money* be delivered to be re-delivered, on refusal debt lies; (o) yet the courts have been under the necessity of repeating that doctrine in banking cases almost more frequently than any other doctrine of the law is to be found repeated. The principle must now be considered to be finally and irrevocably set at rest. (p)

As the right of the customer is to draw out the whole of the sum he deposits with the banker at any time when he shall so please, the acceptance by the banker of a bill drawn upon him by his customer against the amount of the balance in his favour, and made payable at a distant day, is in effect a borrowing of the sum until that day by the banker; for the customer, by drawing the bill, consents that that which is payable immediately shall not be payable until the expiration of the bill, and such acceptance by a banker was held to be a borrowing or owing of [*6] money upon a bill within the *meaning of the former Bank of England acts, 3 & 4 Will. IV. c. 98, and 7 Geo. IV. c. 46, which, in certain circumstances, forbade such borrowing, &c. (q)

Some bankers open what is called a deposit account with any customer who desires to deal in that manner; (that is to say,) the customer deposits a sum, on which the banker pays interest as may be agreed, and which may be entirely withdrawn at any time by the customer, without notice, on presenting the receipt with his name indorsed on it, when the principal, with interest upon it to the day of repayment, is handed to him. (r)

Bankers, as we have said, are bound to obey the orders of their customers within the usual course of business; if they disobey them they are responsible both for the delay and any consequence which directly follows the delay. Thus a house in America employ an agent in Birmingham to purchase and ship to them certain goods: on account of which they send to him a bill drawn by one A. in America on B. in London, but without indorsing it. The agent directs his bankers to obtain B.'s acceptance of it; B. refuses acceptance; of which, however, the bankers omit to give any notice until the bill is due, when they again present it and it is dishonoured. Before the bill arrived in this country A. had become bankrupt, never having had any funds in the hands of B. Then here is a damage done to the agent, but to what amount? Not to the whole amount of the bill, because of the circumstance that the house in America, not having indorsed, were not entitled to notice of dishonour of the bill, and still remained liable to him for the price of the goods he had sent out to them; also the drawer was not entitled to notice, because he had no funds in the hands of the drawee; therefore all that the agent

(o) *Bretton v. Barnett*, Owen's Rep. 86.

(p) See, per Buller, J., *Vernon v. Hankey*, 2 T. R. 121; per Grose, J., id. 124; *Marzetti v. Williams*, 1 B. & Ad. 415; *Sleech's case*, 1 Meriv. 568; *Bank of England v. Anderson*, 3 Bing. N. C. 663; S. C., 2 Keen, 382; *Gaunt v. Taylor*, 2 Hare, 413; *Tussell v. Cooper*, 9 C. B. 509, 526; *Pott v. Clegg*, 16 M. & W. 321; *Jones v. Maund*, 3 Y. & Col., Exch. 154; *Copland v. Toulmin*, 7 Cl. & F. 349; per Parke, B., *Crawford v. Cocks*, 6 Exch. 290; *Bank of Scotland v. Christie*, 8 Cl. & F. 227; *Pennell v. Deffell*, 4 De G. M. & G. 372; *Foley v. Hill*, 2 H. L. Cas. 31.

(q) *Bank of England v. Anderson*, 4 Scott, 118.

(r) *Thompson v. Bell*, 10 Exch. 11.

was entitled to recover, as the circumstances of the case stood, was the *damage he had sustained by reason of his having been delayed [*7] in prosecuting his remedy against the drawer.(s)

In ordinary circumstances it is obvious the bankers might have become liable for the whole amount of the bill, namely, if the American house had indorsed, and the bill had been drawn against effects.

But it is only to their customer that, in the absence of any act of theirs, they are responsible; thus bankers receive bills from a foreign correspondent with directions to pay the amount to the plaintiff: when he applies to them, they refuse; afterwards the amount of the bills comes to their hands. The plaintiff cannot sustain an action against them as for money had and received to his use.(t)

If, however, the bankers had assented to the order, and informed the plaintiff that they held the money for him, he might, of course, have sued them.(u)

However, an order by a customer to his bankers to hold the customer's money at the disposal of A. B., is revocable until actual appropriation or payment of the money accordingly,(x) or until a promise by the banker to A. B. to make such payment.(y)

We have already stated the duty of a banker to be to conform to the orders of his customer, with respect to the money deposited by the customer, so long as there is in his hands a balance in favour of the customer, and the orders relate to things which it is the usage and practice of the particular bank, or of the bankers in the district, to do for their customers, or which the bank has specially agreed with the customer to do for him. Now, if the bankers perform such orders punctually, they will often be exonerated from *loss in cases where it may be difficult, [*8] perhaps, to see any other ground for holding them irresponsible except that the customer's orders have been faithfully and fully performed without negligence or delay.

Much more, then, will they be irresponsible if, acting as the agents of other bankers with whom a party has an account, they conform to the orders of that party, though with him they have no account at all.

Thus, where A.'s broker, by his directions, was accustomed to pay dividends into a banker's in London to A.'s credit in account with a bank at Abingdon, where A. resided, and the London bankers had been accustomed to act accordingly, accepting the payments, giving credit to the Abingdon bank and advising them by post, &c., next day: and a certain payment of this kind was made on 14th October, into the London house by cheque, and they wrote to advise the Abingdon bank in the usual way by the post of the 15th, on the morning of which day the Abingdon bank stopped payment and never again opened the bank for

(s) *Van Wort v. Woolley*, 3 B. & C. 439.

(t) *Williams v. Everett*, 14 East, 582; *Stewart v. Fry*, 7 Taunt. 339; *Wedlake v. Hurley*, 1 Cro. & J. 83.

(u) *Fruhling v. Schroöder*, 2 Bing. N. C. 77.

(x) *Gibson v. Minet*, Ry. & M. 68; S. C., 1 Car. & P. 247; 2 Bing. 7; see *Bradbury v. Anderton*, 1 C. M. & R. 486.

(y) *Lilly v. Hays*, 5 A. & E. 548; see *Walker v. Rostron*, 9 M. & W. 411.

business, and on that day the Abingdon bankers were indebted to the London house to a large amount; the London house received notice of the stoppage on the 15th. A. has no claim against the London bank for the payment so made; for the course of business shows that A. and the country bankers agreed that they would account to him for all sums so to be paid into the London house as above, and that the London house had actually carried the money to their credit.(z)

Here the ground of decision seems to be, that the London bankers, by conforming to the arrangement by which in effect they undertook to comply with A.'s orders as to any money that might come to their hands purporting to be paid in by his authority and under directions from him [*9] as regarded his account with the country bank, of which *conformity the course of dealing was evidence conclusive as not being met by counter proof, the London bankers were exonerated from liability to him; but, possibly, if it could have been shown that they had not in fact given credit for the money in account with the Abingdon bank before it was reclaimed by A., the result would have been otherwise.(a)

It will be observed that A. was not a customer of the London bank; but in another case, where a person paid money into a London bank, also not being a *customer* of the bank, in order that they might cause it to be paid to him or his order, through their correspondents, bankers in a country town, on a certain day, and they received the money, but did not cause the money to be paid on the day, whereby the party suffered damage, &c., he was apparently considered to have a good cause of action against the London bank, on the ground that the receipt of the money was a good consideration for an undertaking to the above effect, and that they might be sued for the breach of their promise in that respect. Now here the London bankers, it is submitted, must either be considered as gratuitous bailees or as debtors in respect of the money paid in; but if they were the former, then it would have been a breach of their duty if they had not remitted the identical coins or bank notes paid in—a proposition which could hardly be maintained as against bankers, therefore it would seem that the party paying in, though not having a running account with them as a customer, must be considered as a customer *pro hac vice*, and the bankers as debtors to him *pro tanto*, and liable to comply with his orders according to the usual relation of banker and customer.(b)

[*10] *Where A., not filling any peculiar character or capacity, receives money delivered to him by B., to be carried to a particular

(z) *Williams v. Deacon*, 4 Exch. 401, 401, Exch. Ch.; see also 11 A. & E. 926.

(a) See *Stevens v. Masterman*, cited 4 Exch. 401, where Lord Abinger, C. B., held at Nisi Prius that such a payment might be countermanded. See *Atkin v. Barwick*, 1 Stra. 166, and cases there cited; *Walker v. Rostron*, 9 M. & W. 411, 421; *Gibson v. Minet*, 2 Bing. 7.

(b) *Shillibeer v. Glyn*, 2 M. & W. 143. In this case the declaration had in the first instance alleged the party to be a customer, but the allegation having been traversed it was struck out, and the amended declaration was demurred to. The money was returned to the plaintiff by the bankers, who afterwards compromised the action. See *S. P., Wheatley v. Loc* (in error), Cro. Jac. 667; *S. C. as Loc's case*, Palmer, Rep. 281, and as cited by Holt, C. J., 1 Salk. 26.

place, and there to be paid to a particular person on account of B., and A. takes the money, but afterwards omits to perform these directions, and in answer to B.'s inquiries says that he has lost the money; it was held, that an action for money had and received was maintainable by B. on these facts merely, though it was objected, that he ought to have brought a special action for the negligence.(c)

There seems, therefore, to be authority quite sufficient for the position that any one who takes upon him to remit money and receives it, the owner confiding that he will do so, has assumed a trust which he is bound to perform, notwithstanding that he gains nothing by the transaction;(d) and certainly it has never been laid down that a banker stands in such a situation as renders his liability, in such circumstances, less extensive than that of an ordinary person; on the contrary, he may fairly be considered, his business being to deal in money, and to facilitate the transmission of money, to be in a situation or position in which skill is implied, and therefore where an omission to use due skill, even on an occasion of a gratuitous employment, is taken as gross negligence.(e)

With reference to the rights of a third person in such case, we may observe in general, the rule is, money paid into a banker's to be paid to a third person is not money had and received to *his* use by the bankers until they have bound themselves to pay it over.(f)

*So that, although in general bankers are bound to comply with the orders of their customers, yet they may refuse, and by [*11] that means, whatever liability to the customer they incur, they relieve themselves from all responsibility to the person in whose favour the order is made;(g) or rather such responsibility does not arise before they do something to admit it, as by agreeing to that effect with him.

The proposition has been laid down more than once, that it is part of the duty of a banker to his customer to be acquainted with his customer's handwriting; it has even been said, as we shall see, that he is bound not only to know his customer's handwriting, but also what is not his customer's handwriting; and there seems to be no doubt that it would be in accordance with all the decisions in which the courts have defined the duties of bankers, to hold that a banker is responsible to his customer (or must bear the loss if any loss arises) for the consequences of his mistakes or oversights in this respect. However, it has been intimated in one case, where a bill of exchange, purporting to bear the indorsement of a customer, but dishonoured, was paid by the banker for the customer's honour, and he afterwards discovered the indorsement to be forged, and have notice to the holder of the bill the same day on which the payment was made, that the banker might perhaps recover from the holder the money he had paid him.(h) However this may be, he could

(c) *Barry v. Roberts*, 3 A. & E. 118.

(d) *Wheatley v. Loe* (in error), Cro. Jac. 667; S. C., Palm. Rep. 381, cited by Lord Holt in *Coggs v. Bernard*, 1 Salk. 26, and *Barry v. Roberts*, 3 A. & E. 118.

(e) Per Lord Loughborough, C. J., *Shiells v. Blackburne*, 1 H. Bla. 158.

(f) *Malcolm v. Scott*, 5 Exch. 610. Compare S. C., 6 Hare, 570, per Parke, B., 9 M. & W. 414, per cur., id. 421; see also 3 Mac. & G. 40, 51.

(g) *Williams v. Everett*, 14 East, 582.

(h) *Wilkinson v. Johnston*, 3 B. & C. 428, cited 9 B. & C. 906.

not at any rate, according to the above rule, recover from the customer.

The nature of the business of bankers has been laid down, by very high authority, to be part of the law merchant; and it is to be judicially noticed by the courts.⁽ⁱ⁾

[*12]

*CHAPTER II.

CHEQUES.

A CHEQUE on a banker, or as it is sometimes called, a banker's draft, is a written order for the payment of a specified sum of money to a person named, or bearer. It is directed to the banker, and is usually signed by the person who draws it, and, out of whose moneys deposited with the banker, it is to be paid on presentment. Its legal effect is, in some slight degree, that of an inland bill of exchange drawn on the banker, and payable to the bearer on demand; in some respects, however, as will be shown, it differs materially from such instrument.

The form of it, when unstamped, is usually the following:—

London, January 1, 1856.

MESSRS. HOLDFAST & Co.—Pay to Abraham Newland, or bearer, the sum of twenty pounds.

£20, 0s. 0d.

JOHN STILES.

No precise form of words is essential; any words that signify not a precatory request, but an order^(a) to pay a sum of money, will suffice, provided the following points be observed:—

1. *That the paper be directed to the bankers by their proper, or usual, style and firm.*

2. *That it be dated, viz., with the name of the place where, and a day of the month and year on or before which, the cheque was drawn.*

3. *That it contain the sum to be paid, which must not be under 20s.*

[*13] *4. *That it be made payable to bearer.*^(b)

5. *That it be signed by the party drawing.*

It seems that a cheque, in any other language than the English, would not be according to the usage of bankers in this country, and therefore a banker might legally refuse to cash such a cheque. We shall state the reasons for these several requisites in their order, together with the principles and rules that have been laid down respecting them, and such illustrations and examples as appear to conduce to the full comprehension of the subject.

1. *As to the Address.*—A cheque, being in fact an open letter of request, must, it is obvious, to be operative, bear upon it the name of the person

(i) Per Lord Campbell in *Bank of Australasia v. Breillatt*, 6 Moo. P. C. 173, referring to *Brandao v. Barnett*, 12 Cl. & F. 787.

(a) See *Little v. Slackford*, 1 Moo. & M. 171.

(b) See *infra*, 17, 38.

who is requested, as well to indicate to the bearer where to present it for payment, as to show the bankers who it is that is called upon to cash the order. On the same grounds that a bill of exchange must have an address according to the custom and usage of merchants, a cheque ought to have one.^(c)

If the bank is carried on under a firm, either the proper and full style of the firm, or the style by which it is usually designated and known, ought to be used.

No person but the person addressed could, after cashing the cheque, have a right to recover from, or have allowed in account with, the drawer, the sum so advanced, which would in fact be in the nature of a gratuitous payment.

2. *As to the Date.*—The Stamp Act, 55 Geo. III. c. 184, Schedule, part 1, exempts from all stamp duties, “all drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers *[[]for any person or persons acting as a banker[]] [[]*(d)* who shall reside or transact the business of a banker [[]*14[]] within ten miles [altered to fifteen miles by 9 Geo. IV. c. 49, s. 15] of the place where such drafts or orders shall be issued; provided such place shall be specified in such drafts or orders, and provided the same shall bear date on or before the day on which the same shall be issued; and provided the same do not direct the payment to be made by bills or promissory notes.”^(d)

Hence the real place where the cheque is issued ought, in order to save the stamp, to be in all cases stated on the face of it. Where an unstamped cheque was dated at Llanelly, but it appeared to have been drawn and issued at a country house called Trimsaran, four miles from Llanelly, the court held it to be void and inadmissible in evidence.^(e)

So, where a cheque was given and dated at Frome, and drawn on London bankers, Lord Ellenborough said, “The cheque was void in its creation. It is a mere blank. I have not legal optics to see its existence.”^(f)

Where the date was the following,—“Dorchester Old Bank; established 1786,” which words were in print, and there was no day of the month and year marked on the cheque, as the time at which it was issued, and the cheque was unstamped, and the objection was taken that

^(c) Beames, *Lex Merc.* p. 563, pl. 3, edit. 1813; *Com. Dig. Merchant*, F. 5. But a document may be an order for the payment of money within the enactments against forgery without being addressed, if it can be shown by evidence to whom it was intended to be addressed. *Reg. v. Snelling*, 23 L. J., M. C. 8; and see case put by Jervis, C. J., S. C.

^(d) This exemption is continued by the schedule of 16 & 17 Vict. c. 39, but that schedule omits the words “or any person or persons acting as a banker,” and therefore confines the exemption to cheques drawn upon actual bankers; cheques drawn on a banker, payable to order on demand, appear to be subjected by that act to a stamp duty of one penny. See sects. 3 & 4 and schedule. As to cancelling the stamp, &c., before issuing, &c., sect. 4. Drafts payable to bearer or to order, at any time otherwise than on demand, are to be stamped according to scale in schedule to stat. 17 & 18 Vict. c. 83.

^(e) *Waters v. Brogden*, 1 Y. & J. 462; see *R. v. Pooley*, 3 B. & P. 312.

^(f) *Borrodaile v. Middleton*, 2 Campb. 55; see *Rex v. Pooley*, 3 Bos. & P. 311, decided when the limit was ten miles from the banking house.

the instrument was void on that account, because the place of issuing was not sufficiently specified, the court decided that the above date [*15] sufficiently showed that the cheque was issued at *Dorchester (which was the case) as it had that word upon its face, and that the other words did no hurt.^(e)

Where a cheque, being drawn by the finance committee of a railway company, was headed with the statutory name of the railway company, but was not dated as drawn at any place, it was held to bear no sufficient indication of the place at which it was drawn to satisfy the Stamp Act, and therefore, being unstamped, to be void.^(f)

A cheque drawn in this form:—

October 12, 1847.

MESSRS. KNAPP & Co. Bankers, Abingdon—Pay to Mr Hicks, or bearer, one hundred and seventeen pounds seventeen shillings.

£117, 17s. 0d.

THOMAS SHARPS.

was considered not to show sufficiently the place where the same was issued, to satisfy the exemption in the stat. 9 Geo. IV. c. 49, s. 15, so that, being unstamped, it was inadmissible in evidence, for the defendant, on an issue joined on his plea of delivery to and acceptance by the plaintiff of a banker's cheque in full satisfaction and discharge of the debt claimed.^(g)

The delivery of a cheque, without the place at which it was drawn being stated on it, does not amount to payment, unless stamped; and therefore, where the vendor of land had taken such a cheque on account of the purchase-money, but had not had cash for it at the bankers' before they stopped payment, he was held in equity to have a lien on the estate for the same.^(h)

The results of what has been stated are these; whenever a cheque is issued fifteen miles or upwards from the banker's place of business it must be stamped.⁽ⁱ⁾

[*16] *It must also be stamped although issued within the fifteen miles, unless all the three provisos above mentioned are observed; that is, unless it bears the name of the place where it was issued, and the date of a day on or before the day on which it was issued, and do not direct the payment of the sum mentioned in it to be made in bills or promissory notes.^(k)

In what mode the fifteen miles are to be measured has not been decided,^(l) though a late statute says the distance is to be fifteen miles in a direct line from the bank, &c.

(e) *Stickland v. Mansfield*, 8 Q. B. 675.

(f) *Lord Ward v. Oxford Railway Company*, 2 De G. M. & G. 750.

(g) *Bopart v. Hicks*, 3 Exch. 1.

(h) *Bond v. Warden*, 1 Coll. 583.

(i) This defence may be taken under the traverse of the allegation that defendant made the cheque; it is not to be pleaded specially. *McDowell v. Lyster*, 2 M. & W. 52; *Field v. Woods*, 6 Dowl. 23.

(k) 55 Geo. III. c. 184, Schedule, pt. 1; 9 Geo. IV. c. 49, s. 15; see *Stokes v. Gressell*, 23 L. J., C. B. 141.

(l) See for various cases of reckoning of distances under statutes, *Grant's Corporations*, 389.

Also, the person on whom the cheque is drawn must be an actual banker; it will not suffice that the drawer treats him as his banker *pro hac vice*, if in truth the drawee does not follow the business of a banker.^(m)

However, it has been decided that an unstamped cheque drawn beyond the legal limit, though inadmissible in evidence to discharge the banker, is admissible to prove the receipt of money by means of it, as part of the *res gestæ*.⁽ⁿ⁾

Again, an unstamped cheque, of a character to require a stamp, and therefore void for want of one, might be given in evidence in such a case as the following:—In an action of debt, with plea of payment, the plaintiff might prove his case by means of a document in which the defendant had admitted the debt claimed, but went on to allege that he had paid it by a cheque, &c., and would be allowed to use in evidence the unstamped cheque to negative the alleged payment.^(o) The production of the cheque is here obviously allowed, not for the purpose of enforcing it as a valid subsisting instrument valuable to the extent of the sum for which it purports to be drawn, but as the means, and the *only means, of establishing its nullity for want of a stamp; and therefore the admission of it is in strict conformity with the [*17] meaning of the stamp acts.

And now, by 17 & 18 Vict. c. 83, s. 7, every one is forbidden to remit, or send, or receive in a payment, a cheque unstamped, to or at a place beyond the distance of fifteen miles in a direct line from the bank at which it is made payable, or in any manner to negotiate or circulate the same, under a penalty of 50*l*.

Next, as to the day of the date.

The day mentioned may be any day before, or the day when, the cheque was issued. The cheque must not be post-dated;^(p) that is, it must not bear date on a day after that on which it was in fact issued. For it is enacted, that if any person shall make or issue any cheque or draft on a banker, payable to bearer on demand, not duly stamped, and not falling in every respect within the above exemption, the drawer shall forfeit 100*l*.; any person knowingly taking it, 20*l*.; the banker knowingly paying it, 100*l*.; and the banker shall not be allowed it in account against the persons by whom or for whom it was drawn, or against any person claiming under them respectively.^(q)

Therefore, unless it be duly stamped, a post-dated cheque is void, and the parties concerned in giving, receiving and cashing it, are liable as above under the circumstances there stated. This is the case, although the post-dated cheque was not intended to be used until the day of the

(m) *Castleman v. Ray*, 2 Bos. & P. 383.

(n) *Blair v. Bromley*, 11 Jur. 617; see *Keable v. Payne*, 8 A. & E. 555.

(o) *Smart v. Stokes*, 6 M. & Gra. 911.

(p) *Allen v. Keeses*, 1 East, 435; *Whitwell v. Bennett*, 3 Bos. & P. 559.

(q) 55 Geo. III. c. 184, s. 13, which semb. first made illegal the post dating of a cheque. The defence of post dating may be taken in an action on the cheque, under the traverse of the making. *Field v. Woods*, 6 Dowl. 23. So that cheque made more than fifteen miles, &c. *M'Dowall v. Lyster*, 2 M. & W. 52; *Jenkins v. Creech*, 5 Dowl. 293.

date: and it is void altogether, even against a *bona fide* holder.(*r*) In [**18*] **fact*, in scarcely any instance, is a post-dated cheque intended to be used before the day of the date; the object, in delivering such an instrument, is to create a security till the day on which the cheque is available.

The following are illustrations of the above positions.

The payee of a post-dated cheque, knowing it to be so, and also knowing that the maker was insolvent, presents to a banker, who being ignorant of these circumstances, pays the cheque for the honour of the drawer: the banker recovered from the payee the whole amount of the cheque.(*s*)

The public officer of a banking co-partnership under 7 Geo. IV. c. 46, sues on a promissory note of defendant's. A plea that the consideration was cash paid by the plaintiff's bank on cheques made more than fifteen miles from their place of business, &c., was held bad, after pleading over, for want of allegation that the cheques were payable to bearer, and payable on demand, or that the amount of any one of them was 40s.(*t*)

A cheque is not *issued* till it is in the hands of a third party entitled to demand cash for it; therefore where a person, having credit with a banker, received money from the agent of the bank, and every week gave that agent an unstamped cheque on the bank for the amount advanced during the week, which the agent sent to the bank as a voucher for himself, and this cheque was drawn more than the limited distance from the bank, and post dated; it was held to come within the exception, this not being an issuing within the meaning of the statute.(*u*)

It must be proved that the banker cashed the cheque, with the full [**19*] knowledge that it was issued in the prohibited manner, **before* he can be made liable to the above-mentioned penalty for knowingly paying.(*x*)

It will be observed that the cheque is required, by the statute, to be made payable to bearer on demand; it does not however, follow that it need contain the words *on demand* on the face of it; for if made payable to bearer, that makes it in law payable on demand;(y) but a cheque ex-

(*r*) *Serle v. Norton*, 9 M. & W. 309; *Field v. Woods*, 7 A. & E. 114; *Steadman v. Duhamel*, 1 C. B. 892, supporting *Field v. Woods*; *Bond v. Warden*, 1 Coll. 563; *Allen v. Kees*, 1 East, 435; *Ex parte Bignold*, 1 Deac. 735; *Bytes on Bills*, 58, (6th edit.)

(*s*) *Martin v. Morgan*, 3 J. B. Moore, 635. In *Poulton v. Watson*, 15 Jur. 1112, it was held that post-dated cheques are not void, and that if a banker pays one, without knowing of the false date, the payment is good.

(*t*) *Green v. Allday*, 1 Gale, R. 218; see 55 Geo. III. c. 184, s. 13; 9 Geo. IV. c. 49, s. 15.

(*u*) *Ex parte Bignold*, 1 Deac. 735; 2 Mont. & A. 633.

(*x*) *Ex parte Bignold*, 1 Deac. 735. In a case which occurred before the statute, it was shown to be contrary to the usage of London bankers to pay a cheque before the day of its date, and therefore a banker, who had so cashed a cheque that had been lost, was made to repay the amount to the party who had lost the cheque. *Da Silva v. Fuller*, cited in *Chitt. Bills*, 148; and per *Parke, B.*, 7 M. & W. 178.

(*y*) See *Whitlock v. Underwood*, 2 B. & C. 157; *East v. —*, 2 Man. & R. 8. On a motion to set aside an annuity, the court will not presume that a draft on a

pressed to be payable "at sight" is not with the exemptions;(z) nor is a cheque not payable to bearer;(a) and if payable to A. on demand, without the words "or bearer," it is not payable to bearer.(b)

A cheque or draft on a banker does not, *ex vi termini*, mean an instrument payable on demand.

There is no objection to dating a cheque on a Sunday,(c) though it is needless to say, it must not be presented on a Sunday, as to do that would not be in compliance with the general rule, that cheques are to be presented in banking hours.

We may add, in further elucidation of this part of our subject, as showing the complete invalidity of cheques issued and paid in defiance of the statutes, the following case decided on a question arising out of the Scottish system of *banking, under which what is called a [*20] cash credit is opened at the bank, which gives the party in whose favour it is granted, the right of drawing cheques upon the bank to the extent of the credit, he finding security. In the case in question the customer of the bank drew upon them at a place beyond the limited distance (his cheques being falsely dated at a place within that distance;) the cheques were also post-dated; the House of Lords decided that the bankers, being cognizant of the mode of drawing, could not recover from the customer's surety upon his bond the amount paid upon these cheques, no debt having been in law incurred by the customer to the banker.(d)

A. signs an order on his bankers, directing them, out of the balance due to him on the final arrangement of his account, to pay to B. a certain sum; he delivers this order to B., and accompanies him to the bank. The circumstance of the delivery to the payee rendered necessary a bill stamp under 55 Geo. III. c. 184.(e)

3. *The Cheque must contain the Sum to be paid, which must not be under Twenty Shillings.*—The relation between a banker and a person who deposits money in his bank being simply that of a debtor to a creditor, to the amount deposited, which, by the usage of bankers, the banker is, at all times, bound to pay out again to the customer upon his cheques under his hand, until the whole, *minus* the banker's commission, is exhausted, provided the cheques are presented within banking hours: it follows, that the payments cannot be required by the drawer of the cheque to be made, in any other mode, than that in which an ordinary debtor can be required to pay an ordinary debt, that is to say, in English money only. The banker is not a bailee, who is bound to return in specie

banker is payable on demand. *Abbott v. Douglas*, 1 C. B. 491; see *Rogers v. Drake*, 2 B. & B. 19; *Rumball v. Murray*, 3 T. R. 298; *Ex parte Mitchell*, 2 East, 140.

(z) *J'Anson v. Thomas*, cited Byles, Bills, 42, reported 3 Dougl. 421.

(a) *R. v. Yates*, 1 Car. Crim. L. 273; *S. C.*, Ry. & Mood. C. C. 170. A void cheque may be subject of larceny. *Reg. v. Perry*, 1 C. & K. 725; see *Reg. v. Watts*, 23 L. J. (N. S.) Mag. C. 56. So may a cancelled cheque. *Reg. v. Watts*, 2 Dears. C. C. 14.

(b) *Cheetham v. Butler*, 5 B. & Ad. 837; *Dixon v. Chambers*, 1 C. M. & R. 845.

(c) *Begbie v. Levy*, 1 Cro. & J. 180.

(d) *Swan v. Bank of Scotland*, 10 Bligh, N. S. 627; *S. C.*, 3 Cla. & F. 610; the reports differ somewhat.

(e) *Parsons v. Middleton*, 6 Hare, 261.

[*21] the coins or other *form of money deposited, upon demand; therefore, although one thousand pounds have been deposited with him in gold, he is not bound to return gold in payment of cheques drawn against it; any cheque which may be presented will be duly honored by paying it in whatever form a legal tender of payment of a debt, of the particular amount specified in the cheque, may be made.

Now a cheque for less than twenty shillings is absolutely void, and the uttering or negotiating such instrument renders liable to a penalty of 20*l.*, mitigable to 5*l.*; also, it is a statutory offence to utter a cheque on which less than twenty shillings remains due.(*f*)

Also, for a considerable period, an enactment stood on the statute book, which made the drawing of a cheque for any sum under 5*l.* illegal; but this has been altered, and there can be no doubt now(*g*) that cheques may be drawn for any sum above twenty shillings; though, perhaps, it still may be illegal to utter a cheque upon a banker for a less sum than 5*l.* when the drawer's account does not show a balance in his favour; and if so, the banker could not be liable to the drawer for refusing to cash such cheque.

Then, for any sum above twenty, and not exceeding forty shillings, a tender of payment of a cheque in silver would be good, because any tender up to forty shillings made in silver is good(*h*) in ordinary cases of debt.

Above forty shillings, and up to and including 5*l.*, gold appears to be the only legal tender; for, as will be seen presently, it is only in case of sums above 5*l.* that Bank of England notes are at present a legal tender, and a banker would be justified in paying cheques accordingly.

[*22] With respect to sums above 5*l.*, the following is the subsisting *law, 3 & 4 Will. IV. c. 98, s. 6,—“A tender of a note or notes of the Governor and Company of the Bank of England, expressed to be payable to bearer on demand, shall be a legal tender to the amount expressed in such note or notes, and shall be taken to be valid as a tender to such amount, for all sums above five pounds, on all occasions on which any tender of money may be legally made, so long as the Bank of England shall continue to pay on demand their said notes in legal coin; provided always, that no such note or notes shall be deemed a legal tender of payment by the Governor and Company of the Bank of England, or any branch bank of the said Governor and Company; but the said Governor and Company are not to become liable or be required to pay and satisfy at any branch bank of the said Governor and Company, any note or notes of the Governor and Company not made specially payable at such branch bank; but the said Governor and Company shall be liable to pay and satisfy at the Bank of England in London, all notes of the said Governor and Company, or of any branch thereof.”

Therefore a cheque for 100*l.* may be cashed at any bank, but the Bank of England, or one of its branch banks, in the following manner,

(*f*) 48 Geo. III. c. 88, s. 3.

(*g*) 17 & 18 Vict. c. 83, s. 9.

(*h*) 56 Geo. III. c. 68, s. 11. A tender of a debt in copper is not good beyond two pence, as it seems, 1 Bla. Com. 277; considering that fourpenny and three-penny pieces form now a part of the currency.

without the banker incurring liability, for refusing to honour the cheque, or otherwise. He may pay 40s. in silver; he may and must pay the next 3*l.* in gold; the remaining 95*l.* he may pay in gold or Bank of England notes, "expressed to be payable to bearer on demand," which therefore must not be made specially payable at a branch bank, it is apprehended, but must be the ordinary Bank of England notes, payable at the Bank of England in London, otherwise the payee of the cheque might refuse them, and the drawer might recover damages in an action against the banker, for refusing to honour his cheque.

A depositor's cheque must be paid at the Bank of England, or one of its branch banks, in gold, for sums above 40s., if he chooses to insist upon it, provided the whole amount *demanded above 40s. can [* 23] be expressed in gold coin; thus, 2*l.* 10s. can be paid with a half sovereign and 40s. in silver; 2*l.* 5s., with a half sovereign and 35s. in silver.

If the above be correct, it will follow that a customer who draws a cheque for 100*l.* on his banker, or the bearer, can only demand 3*l.* of it to be paid in gold; and so of any cheque for a greater sum than 100*l.*; and the same is obviously the case of any smaller sum down to 5*l.*, and and so *mutatis mutandis* of sums under 5*l.* and above 20s. The almost uniformly practised custom of bankers to consult the pleasure of the payee or bearer, as to how he wishes to have the cash paid over to him, is merely a matter of courtesy, and in no respect, except as above mentioned, obligatory on them.

A cheque must not be expressed in foreign money, as dollars, rupees, francs, rubles, &c., both because it is no part of the banker's *implied*(i) contract with his customer, or of his duty of debtor, to pay the debt in any but the known and current money of England; it is no part of his implied contract to insure the customer that he shall always find lying at the bank a sufficient number of the foreign coins, &c., to meet the amount specified in the cheque, nor to procure them, whatever may be the state of the exchanges, &c., and because it is not according to the law merchant or the usage of bankers, that cheques should be drawn in other terms than in the money of account of England, and because every debt ought to be demanded in a known denomination of money.(k)

The money of account of England is expressed in pounds, shillings, pence and farthings; accordingly £. s. d. is taken in law to mean English money; pounds, shillings, pence; and not foreign money, as *ex. gra.* livres, sous, deniers.(l)

By agreement between the drawer and banker, his cheque may direct payment to be made in bills of exchange or promissory notes, but any cheque which does so is void, unless duly stamped, by virtue of the proviso in the 55 Geo. III. c. 184, Schedule, part 1. [24]

(i) Of course such a special contract may be made between the banker and a customer or other person, but the order for such payment would not be, it is conceived, a cheque in law. See Parker, R. 45.

(k) Rastell v. Draper, *Yelv.* 80; *S. C.*, *Moo.* 775; *Cro. Jac.* 88.

(l) Per Abbott, C. J., *Kearney v. King*, 2 B. & A. 303; and see per cur. *Sprowle v. King*, 1 B. & C. 18; *Pierson v. Pounteys*, *Yelv.* 135.

On the other hand, a banker cannot discharge himself from liability on a customer's cheque by tendering payment in any other money than English current money, or in any other form, denomination, or quantity of each denomination, than such as a tender of a debt may legally be made in. ^(m)

Formerly it was not unusual to add in bills and mercantile contracts of all kinds in which money was mentioned, the words "lawful money of the realm," or some term of that effect, *ex. gra.* the word *sterling*, which means current money; ⁽ⁿ⁾ but though these and all similar words are now usually omitted, yet cheques will not be intended to mean any other than current money; and if the sum in the body differs from that in the margin, the sum in the body is the sum which the banker ought to pay. ^(o)

Hence, and from what has been just stated, a cheque in the body of which the sum was expressed only in figures, with the letters *£. s. d.* [thus, £100 : 10s. 8d.] could not legally be refused payment by a banker having assets in his hands, and such a cheque, purporting to bear date at a place in France, and properly stamped and duly presented, would be valid and binding on all parties for the expressed amount in English money.

But to prevent mistakes, and to render frauds less easy, the form given above, in which the sum is twice stated, once in words, and a second time in figures, with the above letters attached, is the one in general use, and ought always to be adopted. For although the Court would [*25] prevent a merely obvious omission or slip from being turned to the *prejudice of any one connected with the cheque, as, for instance, if a cheque were drawn for "twenty-five, seventeen shillings and three pence," it would be held to mean twenty-five pounds sterling, and seventeen shillings and three pence; ^(p) yet in case of a fraudulent alteration of the cheque, if the question which of the two innocent parties, the drawer or the banker, is to bear the loss, arises, it must be answered by resolving the liability to be on that party whose conduct has opened the opportunity for the accomplishment of the fraudulent design; and the loss must rest with one or the other accordingly.

The following instances may be useful:—

A customer of a banker, on leaving home, intrusted to his wife several blank forms of cheques, signed by himself, and desired her to fill them up according to the exigency of his business. She filled up one with the words, *fifty-two pounds two shillings*, beginning the word *fifty* with a small letter in the middle of a line. The figures 52 : 2 were also placed at a considerable distance to the right of the printed *£*. She gave the cheque thus filled up to her husband's clerk, to get the money. He, before presenting it, inserted the words *three hundred* before the word *fifty*, and the figure 3 between the printed *£* and the figures 52 : 2, so that it then appeared to be a cheque for £352, 2s. It was presented,

(m) *Wade's case*, 5 Rep. 114 a; Co. Litt. 207 b.

(n) *Wiltshulge v. Davidge*, 1 Leon. 41.

(o) *Sanderson v. Piper*, 5 Bing. N. C. 430.

(p) *Phipps v. Tanner*, 5 Car. & P. 488, per Tindal, C. J.

and the bankers paid it. Held, that the improper mode of filling up the cheque had invited the forgery, and therefore that the loss fell on the customer, and not on the banker.^(q) Perhaps, however, it would not be safe, according to later decisions, to rely on this decision as stating the law, except as applicable in precisely the same, or, at least, very closely analogous circumstances. Thus, if the cheque had been originally filled up, for fifty-two pounds two shillings, as well as signed, in the customer's handwriting, the rest of the circumstances remaining the same, it would *seem that, as bankers have been held, in general, [*26] to be presumed to know their customer's handwriting and what is not his handwriting,^(r) and to be liable, if they pay a cheque that is not genuine, in all other respects, as well as the signature,^(r) they would have been bound to have taken notice that the words *three hundred* were not in the customer's handwriting, and that they ought to have made inquiries before cashing the instrument in those circumstances, and therefore, not having done so, were responsible.^(s)

And where bankers cashed a cheque of a customer which had been altered, but not so as to be obviously perceptible, to a larger sum than the customer drew it for, there it was held to be the conduct of the banker, in not observing the alteration, that gave the means of accomplishing the fraud of the third party, and that, therefore, of the two innocent parties, the banker and the drawer of the cheque, it was on the former that the loss of the overplus beyond what the cheque was really drawn for, ought to fall.^(t) And so, where there is no fraud, a corresponding rule holds; the party whose conduct led to the loss must bear it.

As where a cheque has been casually lost out of the possession of a person to whom it had been delivered in payment of a debt, and another person, takes it *bona fide* for a full consideration, of these two innocent parties the loss must fall upon the former; and the latter, upon being refused payment by the bankers, who had been ordered by the drawer, after the loss, not to pay it, may recover the amount from the drawer;^(u) and the same would be the case if the equities were equal; for *melior est conditio possidentis*.^(x)

(q) *Young v. Grote*, 4 Bing. 253.

(r) See per Pollock, C. B., *Bellamy v. Majoribanks*, 21 L. J., Exch. 73; and per Bayley, J., *Hall v. Fuller*, 5 B. & C. 750; see *Coles v. Bank of England*, 10 A. & E. 449.

(s) See *Robarts v. Tucker*, 16 Q. B. 560, the principle of which case seems to apply to cheques.

(t) *Hall v. Fuller*, 5 B. & C. 750.

(u) *Grant v. Vaughan*, 3 Burr. 1525, 1526; and see per Lord Kenyon, C. J., 3 T. R. 177, 182.

(x) Per Wilmot, J., S. C., 3 Burr. 1526; see also *Willet v. Chambers*, Cowp. 814; *Bond v. Gibson*, 1 Campb. 185. In equity the principle holds, that a creditor may by an order on his debtor effectually assign his debt to a third person; therefore, in all cases of valid cheques, it seems the bearer might recover in equity against the banker if necessary. *Rodick v. Gandell*, 12 Beav. 325. Thus in circumstances such as the above, if Vaughan had become bankrupt after the presentment to and refusal by the bankers, then, upon showing that the bankers had assets in their hands at the time of the presentment to satisfy the amount, it seems they would have been liable in equity to Grant, for Vaughan had no right to order them not to pay the cheque, at least that circumstance could be their only ground

[*27] **As to Cheques made payable to Order on Demand.*—With respect to the subject of indorsed cheques, it has been enacted(y) “that any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or any indorser thereof.”

Notwithstanding this statute, however, it would probably not be safe for bankers to pay a cheque, purporting to be drawn by a customer and to be indorsed by the payee, without ascertaining the genuineness of both signatures, *if the customer had at time of presentment and payment no funds in their hands*; for it has been held in the analogous case of a bill, accepted by a customer payable at his bankers', that they were liable on paying the bill for his honour, not having funds, and could not recover from the customer, not having taken means to ascertain the correctness of the acceptance *and indorsement.(z). The statute [*28] does not appear to alter the principle of this decision as applicable to cheques, as it turns on the circumstance that the bankers, in the absence of funds of their customers, are not bound to pay the bills, and therefore, if they choose to do so, they act under peril of being responsible, in case the instrument turns out to be vitiated by fraud or forgery. The statute can only be taken, it is submitted, to relieve bankers from the necessity of ascertaining the genuineness (so as to be able to prove it at the trial) of the payee's indorsement, and in cases where, independent of any consideration of the indorsements, they would be bound to pay the cheque. The statute may be considered as saying, “if, given the genuineness of the payee's indorsement, &c., you would by the law, and by the usage of bankers, be bound to pay, there you shall be relieved from the necessity of proving the payee's indorsement, &c., and shall be entitled to have the benefit of such a payment, on showing an indorsement, purporting to be that of the payee.” But in the case above stated, the bankers would not be bound to pay a cheque, without first having funds of the person purporting to be drawer in their hands,

of defence. But however this may be, it is conceived to be clear that in an ordinary case of the bearer of a cheque presenting to bankers having assets of the drawer in their hands at the time, the bearer might in equity recover from them the amount. They would also be liable at common law to the drawer if he had not interfered to forbid them paying.

(y) 16 & 17 Vict. c. 59, s. 19. Stamp, see Schedule. Stamp on cheques for payment to bearer or order otherwise than on demand, 17 & 18 Vict. c. 83, Schedule.

(z) *Forster v. Clements*, 2 Campb. 17. Where they pay for honour of the drawer to payee, who presents for payment, knowing the maker to be at the time insolvent and the cheque to be post-dated, the bankers being ignorant of both circumstances; they may, according to the obvious justice of the case, recover back the money from the payee who has cheated them out of it. *Martin v. Morgan*, 3 J. B. Moo. 635.

and without, secondly, being satisfied, and therefore able to show, that a person purporting to be the drawer, and having funds in their hands, actually drew the cheque presented and paid. In other words the statute applies to cases of cheques, really drawn, by persons entitled to draw; for such only are drafts drawn for a sum of money, *payable to order on demand*.

It may be also doubted, perhaps, whether in a case where the payee of the cheque was also a customer of the bankers, and so they would be presumed to know his handwriting, and what is not his handwriting, an indorsement *purporting to be his, would be a sufficient authority to them to pay the bearer, within the meaning of the statute, [*29] if such indorsement were shown to be not the payee's handwriting, but a forgery. The statute does not apply, it will be observed, to drafts drawn on a banker *and made payable to order on demand*, but to drafts "for a sum of money payable to order on demand," and the sum in a cheque, such as these above mentioned, is not payable (*i. e.*, such as it is their duty to pay) to order on demand. (a)

The extent to which a party may insist that his cheque shall be cashed in particular descriptions of money or currency, also the extent to which bankers are bound to pay in particular denominations of coin, has been stated above, but nothing that has been said must be understood to invalidate the power, which the parties possess, of entering into any agreement to make and receive the payment of cheques, by any descriptions of valuable circulating medium that they choose, although such be not recognized by law as money.

Thus, if the bearer of a cheque requests or does not object, *at the time of payment*, to receive payment in country bank notes, the banker may so cash the cheque, and the bearer cannot afterwards object that the notes turned out to be worthless, (b) provided that all has been fair and honest on the banker's part; but if there has been any unfairness or fraud practised by the banker, as if, when tendering them in payment, the banker knew that the bank which issued the notes was in a failing condition, there the notes, though not objected to at the time, would not be a good payment, (c) and the banker would remain liable to the drawer to the full amount of the cheque, and probably to damages for dishonouring it; (d) for his having induced or allowed the *bearer to take, as [*30] payment of the cheque, that which he was aware it was doubtful,

(a) Nevertheless there may be cases where "payable on demand" is the same as "made payable on demand." See per Buller, J., *Janson v. Thomas*, 3 Dougl. 421.

(b) *Polglass v. Oliver*, 2 Cro. & J. 5; *Vernon v. Bouverie*, 2 Show. 296.

(c) *Spurraway v. Rogers*, 12 Mod. 517.

(d) In *Rolin v. Steward*, 14 C. B. 595, which was an action against bankers by a trader having assets in their hands for dishonouring three cheques amounting in the aggregate to 111*l.* 13*s.*, and no special damage was proved, the jury gave 500*l.* damages. The court in banc suggested that the parties might relieve them from giving any ultimate opinion, but intimated they inclined to think the damages very large, whereupon it was agreed by the parties to reduce to 200*l.*, and the judgment was entered up accordingly. When the payee sues the drawer, he must prove notice to the drawer of the non-payment. *Treacher v. Hinton*, 4 B. & A. 413.

at least, whether it could ever be realized as money, was an injury to the drawer, for which, though it might be considered not to wear exactly the same aspect as a dishonour by way of declaration that the drawer had no assets in his hand, still is prejudicial to him, in this respect, that he is unnecessarily and without any fault of his, obliged to pay the debt over again to the creditor to whom he delivered the cheque, as payment of the debt between them; and the drawer of a cheque has a right to require that his draft shall be promptly and effectually and *bnnâ fide* cashed. The payee or bearer has no recourse against the banker, because the effect of the cheque is only to designate the hand to which the banker shall pay his debt to drawer, not to constitute the banker the debtor of the party presenting the cheque. Therefore, in the case of a payee having taken a cheque in payment, and sending his servant to present the cheque, the cheque being paid by the banker as above, the payee would be enabled, it would seem, to come upon the drawer for the amount, on the ground that without fault, on his part, the original debt was still undischarged. So, if the cheque had passed through several hands before arriving at the party who presented it, it seems the bearer might have recourse to the party from whom he received it, and he to the party who paid it to him, and so on till the payee ultimately would recover from the drawer. On the other hand, the payee, it might perhaps be contended, is the only person who is competent to sue the drawer, for [*31] there is no original privity between the drawer and the mere *bearer, and the circumstance that he directs the banker to pay the payee or bearer is for the convenience of the payee, and cannot form a ground for enlarging the drawer's original liability, which is in no wise affected, it is apprehended, by circulating the cheque.

It is true, in the case of a promissory note, payable to bearer on demand, it has been said the bearer is a party to the note, and may sue the maker on it, for the maker had expressly promised to pay the bearer; (e) but it may be questioned whether this doctrine extends beyond promissory notes, to which the statute gives the same qualities of assignability that belong to bills of exchange by the law merchant; but neither a statute nor the law merchant enables the parties to a cheque on a banker to annul the common law prohibition against assigning a *chose in action*.

Nevertheless, it was stated incidentally by the Court of Exchequer, in the course of a very elaborate judgment, but without the point having been noticed in the argument, or being necessary to the decision, or indeed having much, if any, connection with the question decided, that the holder of a cheque may sue a drawer on non-payment by the banker, if he be holder for value. (f) But however this may be, it is remarkable that there is no case in which the bearer has recovered against the drawer, except in circumstances which brought the cheque within the category of bills of exchange, and where it was sued on as such, and therefore the custom or law merchant was relied on.

(e) Per Bayley, J., *Camidge v. Allenby*, 6 B. & C. 373, cited per Patteson, J., *Robson v. Oliver*, 10 Q. B. 713.

(f) See *Bellamy v. Majoribanks*, 21 L. J., Exch. 77.

But the general opinion seems to be, that the bearer may always sue the drawer of a cheque upon dishonour by the banker on a proper presentment; and the ground seems to be, that the drawer promises every bearer that the amount shall be paid on due presentment; it may also be said, that the bearer takes the cheque in payment on the [* 32] faith *of the drawer's name, which faith the drawer expressly invites, by making the instrument payable to bearer, and the books of precedents contain forms accordingly; but it is observable, that the point has never been solemnly decided. (f)

(f) See 2 Chit. Pleading, 100, (7th edit.) 1 Wentw. 373; Serle v. Norton, 9 M. & W. 309; Watson v. Poulson, 15 Jur. 1111; Serrell v. Derbyshire, &c., Railway Company, 19 L. J., C. B. 371.

In *Boehm v. Sterling*, 7 T. R. 426, an instrument was drawn on bankers and made payable to Dobson or bearer, but was not delivered to Dobson, but to persons under whom plaintiff claimed; and there the plaintiff, being the holder sued the drawer, and the instrument was treated as a bill of exchange, and therefore not the general law which forbids, but the law merchant, which, in regard to bills of exchange, sanctions, the assignment of a chose in action, was relied on.

In *Samuel v. Green*, 10 Q. B. 262, debt was brought by holder against drawer on a cheque drawn, payable to Tucker or bearer, and the cheque was alleged to have been delivered by drawer to plaintiff; in fact, the cheque was handed to Tucker, but without consideration, and merely that he might get money upon it for the defendant, and he delivered it to plaintiff; Tucker therefore was to be looked upon either as agent for plaintiff or for defendant, and in either case delivery to him was delivery to plaintiff, from whom a consideration moved to the defendant. N. B.—Now, in case of a bill of exchange payable to bearer, there must be a stamp to make it valid.

In an action by payee v. drawer, it is a good answer to show that there was no consideration for drawing the cheque; *Mills v. Oddy*, 3 Dowl. 722; and would it not be equally so to show that there was no consideration between bearer and drawer, otherwise the payee's servant sent with the cheque and refused payment might recover to his own use. If it be urged that the defendant promises on the cheque that his banker shall pay any one who presents it, it may be replied that he cannot make such promise, for it is *nudum pactum*, by which he is not bound as regards a mere bearer. *Moore v. Barthrup*, 2 Dowl. & R. 25, lays down that a cheque is a mere chose in action, not assignable, and not recoverable by action [of trover]. Except as above mentioned in this note there appears to be no case reported in which a mere bearer has recovered against the drawer.

It is to be observed that the notion at one time entertained of *nudum pactum* not applying to written or mercantile contracts has long been entirely exploded. *Rann v. Hughes*, 7 T. R. 350, n.; In Dom. Proc. per Ld. Kenyon, C. J., 1 East, 104; *Bank of Ireland v. Archer*, 11 M. & W. 389.

If it be said "the practice is so," it may be answered, that can make no difference; the real question is, "what is the law?" Per Ld. Ellenborough, C. J., *Glyn v. Baker*, 13 East, 513, 514.

Scott v. Franklin, 15 East, 428, is a peculiar case: there a customer whose account was overdrawn pays into his banker's on his running account, a cheque for 500*l.* drawn in his favour by a third person. The bankers have a lien on such cheque for the balance due to them. Therefore it was held, that on their bankruptcy their assignees might sue the drawer, who, the report says, defended on behalf of the customer, and recover not the amount of the cheque, which was 500*l.*, but the amount of their lien, which was 74*l.* 9*s.* 9*d.* Ld. Ellenborough treats the cheque as a bill of exchange, payable to bearer, which was immediately due, and says, if it passed to the bankers by the delivery at all, it passed a legal and not a mere equitable lien. This, it is submitted, cannot be considered as an authority for saying that bearer may recover against drawer upon a cheque as such.

Referring to the former part of this note, we may observe the lateness of the period at which bills of exchange payable to bearer were considered to be within the custom of merchants. So late as the year 1764, we find the recorder of London denying there was any instance of any custom of merchants of a bill of ex-

[*33] *But if the cheque be cashed in forged Bank of England notes, the payment is a nullity; for it is only in *valid* bank notes that a tender can legally be made; (*h*) and the law appears to be that, in strictness, the drawer might recover damages from the banker for dishonouring his cheque, although the banker were ignorant when he tendered the bank notes that they were spurious; for the payee of the cheque may certainly treat the debt due to him from the drawer as unpaid, and may [*34] recover it from him; and consequently *the drawer may recover from the banker; according to the rule above stated, that when a loss must fall upon one of two innocent parties, the sufferer must be the party whose conduct has most immediately led to it; and here the banker is guilty of laches and negligence in not ascertaining the genuineness of the bank notes before he tenders and passes them.

As there is no privity between the bearer and the banker, and the former is merely the hand into which the banker is directed by the drawer to pay the debt which the banker owes to him (the drawer,) and the order of the drawer cannot operate to make the banker debtor to the bearer, of course the bearer cannot sue the banker for non-payment, unless in the unusual case of the banker's accepting the instrument. (*i*)

From what has been said it will be seen how great is the difference in the situation of the payee of the cheque, when the payment is made by the banker in notes of the Bank of England, and in notes of any country bank: for a payment in spurious paper, purporting to be that of the Bank of England, is a nullity, whether objected to or not at the time; and the banker, upon the forgery being discovered, must pay over again the sum which they purported to represent, provided the payee of the cheque has not paid them away, and got value for them, in the meantime; and the reason is, because the payee is, *prima facie* bound, to take such notes in payment every where, but from the Bank of England or its branches, and the legislature having made them a part of the currency,

change being made payable to bearer, *Grant v. Vaughan*, 3 Burr. 1517, in which case it was first decided that such a bill was negotiable within the custom of merchants. *Hennings v. Rothschild*, 12 J. B. Moore, 575, 576; see 3 N. R. 183, 481, per Heath, J.; *Gibson v. Minet*, 1 H. Bla. 621, per Eyre, C. B.; S. C., *id.* 606; *Jordan v. Barlow*, 3 Salk. 67, 68.

See *Story on Bills*, §§ 200, 57, 62. Such bills are only transferable by delivery merely in virtue of the law merchant, but no authority has ever said that the law merchant extends to cheques. However, the following passage in a judgment of the Court of Exchequer Chamber appears to state the law in accordance with the considerations stated in this note:—"The instruments by which the alleged payments were made are described as drafts or orders whereby the defendants' (Bank of England) cashiers were directed to pay the money to the plaintiff. It is clear that such an instrument will not, by the general law, give any right of action to any person (other than the plaintiff) who might become possessed of it; and it was not contended in the argument at the bar that such right of action existed by the general law; but it was insisted that the usage and custom of merchants and bankers, stated in the pleas, gave such a right of action, &c., but we are of opinion that the usage and custom stated have no such operation." *Partridge v. Bank of England*, 9 Q. B. 424, 425, referring to *Glyn v. Baker*, 13 East, 509, 514, where a similar doctrine had been held with respect to India bonds. See *Miller v. Race*, *Smith's Lead. Cas.* and notes there; 14 M. & W. 405, 407, per Parke, B.

(*h*) See per Littledale, J., *Camidge v. Allenby*, 6 B. & C. 385.

(*i*) *Bellamy v. Majoribanks*, 21 L. J., Exch. 77.

the genuineness of such notes is *prima facie* to be presumed, and if not, the payee has no ready test by which it can be ascertained, or even an approximation to proof be made, whether they are good notes or forged : he is therefore *prima facie* obliged to take them, when tendered in payment.

Country Bank Notes.—With respect to country bank *notes the case is different, they form no part of the currency; the [*35] payee's choice of taking or refusing is absolutely free; he is aware not only that they may be forged, but (what is quite possible in this case,) that the country bank may have stopped payment before they can be presented. If therefore the payee elects to take them as cash, he must be held to have chosen to bear either of the risks that attach to them, and the banker, if he have made no improper representations to induce the payee to receive them, and did not know at the time that he tendered them in payment that for any reason they were worthless, or likely to be so by the time they could be presented at the country bank for payment, will be absolved from further liability.

Counterfeit Coin.—Similarly in case the banker innocently makes the payment in bad coined money, the payee taking it in payment without objection on the moment, that is before the transaction of the presentment and payment, can be considered as fairly at an end, cannot afterwards complain, and must bear the loss, for he takes it at his peril; and having once recognized it as money, cannot afterwards be allowed to say it is not so.(k) This, which is the general rule applicable wherever a debt is paid in coin, seems to rest on satisfactory grounds; for there are various and well known tests which may readily be applied for the purpose of ascertaining the goodness of money, as weighing, ringing, &c.; and, moreover, it would obviously open a door to fraud, and endless confusion and delay of business, if the payee of a debt were allowed to say that "such and such coins were received in payment from the debtor and were bad; their account must be paid over again." In most instances, this would be to place the debtor, who would be without any means of showing that the coins he paid with were other than those which the creditor alleges to be forged, at the mercy of the latter. The principle, therefore, that a loss *which must fall upon one of two innocent [*36] parties, shall fall upon that one whose conduct has given rise to it, seems to apply here; and to show the propriety and justice of ruling that the payee who might, but did not, apply some test, or take the objection at the proper time, is for ever concluded. If the banker, upon the objection being made, should insist that the money is good, and refuse to change it for other coins, the payee ought to request him to put some private mark upon the money, and perhaps to place it in the hands of some third person, until it could be assayed, or other decisive means taken to ascertain its real value.

Payment by Bill of Exchange.—So the payment of a cheque may be made, if the holder pleases, by a bill of exchange drawn by the banker.(l)

(k) *Vane v. Studley*, cited by Sir E. Coke in *Wade's case*, 5 Rep. 115.

(l) *Com. Dig. tit. Merchant*, F. 17. So also, in like circumstances, the banker may pay a cheque by his promissory note. *Sayer v. Wagstaff*, 5 Beav. 415.

But under this head many points, some involving questions of much nicety, are to be noticed.

1. If the drawer of the cheque, sending his servant to get it cashed, orders or gives him permission to take, instead of cash, the banker's bill of exchange, that is, a bill of exchange drawn or indorsed by the banker, the drawer of the cheque will only be entitled to come upon the banker for the amount in case of the bill not being paid at maturity, if he has taken all due measures to obtain payment of the bill, by endeavouring to get it accepted, &c.; for it follows, from the legal relation between a banker and a depositor of money with him, that the former is the debtor of the latter, and by the express words of the statute 3 & 4 Anne, c. 9, s. 7, *(m)* "if any person doth accept any inland bill of exchange for and [*37] in satisfaction of any former debt or sum of money formerly *due unto him, the same shall be accounted and esteemed a full and complete payment of such debt, if such person accepting of any such bill for his debt doth not take his due course to obtain payment thereof by endeavouring to get the same accepted and paid, &c." If, therefore, the drawer of the cheque takes all due steps for the above purposes, then the loss, if the bill is dishonoured at maturity, must fall not upon him but upon the banker; if he neglects to take proper measures he must bear the loss.

2. In the case of the payee, however, the statute does not apply, because there is no debt antecedent or otherwise between the banker and him, he is only the hand appointed by the banker's creditor, who draws the cheque, to receive payment of the banker's debt to the drawer.

If, therefore, the payee chooses, on presenting the cheque, to take the banker's bill of exchange instead of cash, and the bill is not paid, the payee must bear the loss; he cannot have recourse to the drawer of the cheque, for the drawer having given him the means of getting his debt discharged in cash, cannot be in a worse position because the payee has elected to take something else; *(n)* and he cannot come upon the banker, because he exercised his option when he might have insisted on payment in money, and there is no debt due from the banker to him, as the cheque does not operate at common law to transfer a *chose in action*; the consequence is, that in the absence of fraud in the banker, the payee of the cheque bears the loss; and this must be the case independent of any laches on his part, and whether he takes the due course to get the bill accepted, &c. or not.

3. The same must be the case, although the cheque had circulated through any number of hands before getting into the possession of the bearer, who ultimately presents it for payment; if he chooses, under the circumstances above mentioned, to take in payment the banker's

(m) Nearly the same thing had been ruled before the statute in *Darrach v. Savage*, 1 Show. 155. If the servant had no authority to take a bill of exchange in payment, the case would be different, and the banker would be liable. *Ward v. Evans*, 2 Ld. Raym. 928.

(n) *Smith v. Ferrand*, 7 B. & C. 24; *Com. Dig. tit. Merchant, F. 17*; *Strong v. Hart*, 6 B. & C. 160; *Abbott, Shipping*, 419, (8th edit.)

bill, the drawer *and all the successive holders between the drawer and the person presenting for payment are wholly discharged, for none of them are consenting parties to the bearer's election to take less than cash, and cannot therefore be liable for the consequences; therefore, in the absence of fraud in the banker, the bearer suffers the loss. [*38]

In none of these three cases can the drawer sue the banker for dishonouring his cheque, or otherwise. The general principle that an objection to a tender must be made at the time of the tender, seems to apply here,(o) and the banker is exonerated by showing that he paid the cheque in a manner with which the bearer was satisfied.

So if the bearer requests it, or does not object at the time, the payment may be effectually made, in the absence of fraud or concealment of facts, in bank post bills.(p)

So, in like circumstances, payment may be made by another cheque drawn by the banker, and the loss, if any, must fall on the taker.(q)

4. *The Cheque is usually made payable to a person named or bearer.*—That the cheque be made payable to bearer is the essential part of this head;(r) to be exempt from the stamp it must, as will be seen by reference to the extract from the Schedule, part 1, of 55 Geo. III. c. 184, given above,(s) be made payable to bearer: the statute says nothing about the name of the intended payee being inserted; but by the nearly universal practice as regards bankers' cheques, a name is inserted, as of a person, in whose favour the cheque is drawn; and the convenience of this is obvious, for by inserting the name, or the word "self," and then adding "or bearer," either the payee in person, or any one to whom *he may deliver the cheque, is competent to receive the cash for it, and the banker is bound to pay it in either [*39] case.

A cheque made payable to a person named, without the words "or bearer," or words to the same effect, is not a cheque within the meaning of this statute, and therefore cannot be paid by a banker, except under the penalty above mentioned, and the additional punishment of incapacity to charge the drawer on account with the sum paid upon it,(t) unless it be stamped.

Also, such cheque, *without the words "or bearer,"* would be defective as regards the above statute, unless it contained the words "on demand;" because though a cheque made payable to bearer is, in legal construction, payable on demand, a cheque made payable to a person named, without more, is not payable on demand.(u)

That it is not indispensable to name an individual person is shown by

(o) Richardson v. Jackson, 8 M. & W. 298; Bull v. Parker, 2 Dowl. N. S. 345.

(p) Tiley v. Courtier, cited per Bayley, J., 2 Cro. & J. 16.

(q) Jones v. Arthur, 8 Dowl. 442; Wilby v. Warren, cited 2 Cro. & J. 18, n.

(r) In Tate v. Hilberd, 2 Ves. Jun. 118, the form was "Pay to self or bearer 200l." So Other v. Iveson, 24 L. J., Ch. 654.

(s) Supra, 13, 14.

(t) Supra, 17, stat. 55 Geo. III. c. 184, s. 13; R. v. Yates, Moo. C. C. 170.

(u) See Doe d. Church v. Pontifex, 9 C. B. 229.

this, that a cheque drawn thus, "Pay ship *Fortune*, or bearer," is a valid instrument, and may be sued upon by bearer.(v)

5. *The Cheque must bear the Drawer's Signature.*—Signature does not necessarily mean subscription, or writing the full name at the foot of the document; if the name appear in any part of the cheque, so as to show who it is that orders the payment, that will be sufficient to authorize the bankers to pay, provided the handwriting be that of their customer of the name stated. For the reason of requiring signature will be thus satisfied; for adequate means of identification by the handwriting will be afforded.(x)

Thus a cheque would be good which, instead of being subscribed with [*40] the name of the drawer, as in the form *above given, was expressed thus:—"I, John Stiles, desire you to pay," &c.; and were properly addressed, &c.; or thus: "Mr. Stiles desires Messrs. Holdfast to pay," &c.; for in either case, being written by the party drawing, the cheque would contain sufficient means of identification.

An illiterate person must draw a cheque, by placing his mark, in the usual place of writing a name and style, on a cheque, the body of the cheque being filled up in the usual manner.(y)

An infant cannot draw or sign a valid cheque; in other words, a banker cashing the cheque of an infant, is not thereby discharged; for a person under age cannot draw a cheque, for he cannot give a legal discharge.(z)

Executors.—Executors, however numerous, are regarded in law as an individual person; and therefore the acts of one of them, in respect of the administration of the effects, are deemed to be the acts of all. Hence payment to one is payment to all; and it follows that if a number of executors have a fund standing in their joint names at a banker's, payment of a cheque signed by one of the executors will discharge the bankers as to all of them.(a) So it would be, although the executors were acting under a forged will.(b)

So a payment to the cheque of any of several administrators, made bona fide, would discharge the banker, although a will should afterwards be found.(c)

So a payment to the cheque of a surviving administrator of several, exonerates the bankers: in a case where such survivor drew out a fund and absconded, the loss was made to fall on the estate of the deceased administrator.(d)

(v) *Grant v. Vaughan*, 3 Burr. 1527, 1528; and see *id.* 1530, marg.; per Eyre, C. B., *Gibson v. Minet*, in Dom. Proc. 1 H. Bla. 699.

(x) *Taylor v. Dobbins*, Stra. 399; *Saunderson v. Jackson*, 2 Bos. & P. 238; *Lobb v. Stanley*, 5 Q. B. 574, where the christian name of the writer was not given. See *Bleakley v. Smith*, 11 Sim. 150; *Parker v. Smith*, 1 Coll. Ch. C. 608.

(y) Per Maule, J., *Serrell v. Derbyshire, &c., Railway Company*, 19 L. J., C. B. 373.

(z) See per Lord Abinger, C. B., *Calland v. Lloyd*, 6 M. & W. 31.

(a) *Ex parte Rigby*, 19 Ves. 462; *Shep. Touchst.* 484; *Can v. Read*, 3 Atk. 695; but see *Gaunt v. Taylor*, 2 Hare, 413.

(b) *Allen v. Dundas*, 3 T. R. 125.

(c) *Pond v. Underwood*, 2 Ld. Raym. 1210.

(d) *Clough v. Bond*, 3 Myl. & C. 490; see 8 Sim. 594.

*With respect to the assignees of a bankrupt, payment to one of several has been held not to be good ;(e) there are, however, other [*41] cases(f) in which such payment has been held valid to discharge the debtor when made *bonâ fide*, and unless the other assignees have expressed their dissent.

It would seem, therefore, doubtful whether a banker would be discharged by honouring a cheque signed by one of several assignees, in ordinary circumstances.

An agent has no authority, as such, to overdraw a banking account ; but if he has done so, with the knowledge of his principal, that is evidence from which the jury may infer authority.(g)

Trustees.—In case of trustees in general, or any other body of persons not being in partnership, having deposited money to their joint account with bankers, the latter are, by the nature of the relation between banker and customer, as regulated by the usage of banking, entitled to have assurance that each of the trustees, or each of the body of persons, assents to and authorizes the money being paid out, and therefore, in such case, the law is that each trustee, or each of the body, must sign the cheque,(h) or the bankers may refuse to pay it ; for they will not be discharged if they do pay it, except where, subsequent to the deposit, the drawer has become alone entitled to receive the money.(i)

In the case of several persons, not partners, having a joint deposit account with them, they could not plead in bar with effect, nor could they even plead, it would appear, in abatement, that since the commencement of the action they had paid the sum on the cheque of one of the plaintiffs ; for, *though it is a general position, that a payment, or an accord and satisfaction, of the joint debt may take place between [*42] one of several plaintiffs and the defendant, which the latter may set up against the further maintenance of the action, that only holds where there is nothing illegal in the transaction ; but, it seems, that the law merchant prevents a payment on a cheque drawn by one of several, not in partnership, from binding them so as to cancel so much of the joint debt, and therefore that the payment having been made by the bankers, in violation of the law and in their own wrong, cannot be so taken advantage of ; in other words, the bankers would be liable to pay the money over again.(k) Nor, in the absence of fraud, could they recover from the drawer of the cheque the sum they had paid him ; for a sum paid with a full knowledge of the facts (knowledge of the law being imputed) cannot be recovered back ; it is in such case a gratuitous donation.

Where one of such trustees has absconded, so that his signature cannot be obtained, equity will relieve by making an order that the bankers shall

(e) *Can v. Read*, 3 Atk. 695.

(f) *Smith v. Jameson*, 1 Esp. 114 ; *Bristow v. Eastman*, id. 174.

(g) *Pott v. Bevan*, 1 Car. & K. 335.

(h) *Innes v. Stephenson*, 1 M. & Rob. 145 ; *Husband v. Davis*, 10 C. B. 640 ; *Stone v. Marsh*, Ry. & M. 364 ; see *Carvick v. Vickery*, 2 Dougl. 653, n.

(i) *Lee v. Stewart*, M. & Malk. 160.

(k) Compare *Wallace v. Kelsall*, 7 M. & W. 242, with *Husband v. Davis*, 10 C. B. 640.

pay the cheque of the remaining trustees; *(l)* at least, this will be done in bankruptcy in case of assignees of bankrupts absconding or dying; and so in the case of other trustees of funds over which the court has control; *(m)* and in such case the court would probably order, in proper circumstances, the payment to one alone, however numerous the trustees might be. *(n)*

The above position, with respect to the relief in equity when the signatures of all the persons (not partners,) to whose joint account money [*43] is in the hands of bankers, has *been stated, in a work of authority, in more general terms, as if equity would assist, in all cases, where it was become impossible to obtain the full complement of signatures; *(o)* but there appears to be no decided case, furnishing any ground to suppose that such interposition may be had, in any instances but those, where the fund is already, from some special circumstances, under the control of the court; and the language of the legislature, in the late "act for the further Relief of Trustees," seems to show that there was no such general practice, even in favour of trustees, previous to 1849; for it empowers any equity judge, where moneys shall be deposited with any banker on the account of any persons as trustees, executors or administrators, or *otherwise*, to make such order for the payment of such moneys to the major part of such trustees, &c. where for any reason the concurrence of the others cannot be had, &c. as to the said judge shall seem meet, &c. *(p)*

Although the following case is but slightly connected with this part of the subject, it may not unfitly be added at the close of the subject of signature of cheques by trustees.

A receiver in chancery, in order to induce two persons to become his sureties, arranges with them that the rents of the estate shall be paid to a third person, and by him paid into a bank, to the joint account of the two sureties, and that all cheques shall be in the handwriting of the third person, and shall be signed by himself, the receiver. On the failure of the bank, it was held by Lord Brougham, C., and his decree was confirmed by the House of Lords, that the receiver and his sureties [*44] were liable for the amount of the *fund, for that a trustee has no authority to place a trust fund beyond his own control. *(q)*

Accountant-General.—How cheques are to be drawn, &c., by the accountant-general in bankruptcy may be seen in 12 & 13 Viet. c. 106,

(l) Ex parte Hunter, 2 Rose, 363; S. C., 1 Meriv. 408; see Sloman v. Bank of England, 14 Sim. 475.

(m) See ex parte Collins, 2 Cox, Ch. C. 427, 428.

(n) Shortbridge's case, 12 Ves. 28. See as to trustees having funds in private banks, 12 & 13 Viet. c. 74; Sidn. Smith's Chanc. Pract. (1855), 440.

(o) See Byles on Bills, 18, (6th edit.) None of the numerous works on chancery practice state any such rule.

(p) 12 & 13 Viet. c. 74, s. 1. Comparing this act with the former Trustees Relief Act, 10 & 11 Viet. c. 96, which it was passed to amend, it seems difficult to perceive the need for it, if the courts of equity had already the general power of ordering any funds standing in a bank, to the joint account of several, to be paid, in proper circumstances, to the cheque of a single one.

(q) Salway v. Salway, 2 Russ. & M. 215; In Dom. Proc. nom. Baugh v. White, 3 Cha. & F. 52; see Lewin's Trusts, 273, (2nd edit.)

s. 34, and the rules and orders made in pursuance of that statute, Rs. 138, 139.

How cheques are to be signed, in cases of cheques on the Bank of England or its branch banks, where a joint-stock company is being wound up, see 19 & 20 Vict. c. 47, s. 83.

Partners.—In the case of partners having a joint account with a banker,—

“There is no doubt but that the act of every single partner, in a transaction relating to the partnership, binds the others.”(r)

Therefore, in the absence of any special agreement, fixing the mode in which cheques should be drawn upon the partnership fund, in his hands, the banker would be bound to honour cheques drawn in any of the modes following:—

1. A cheque bearing the signature of any one of the partners. This is allowed by the law merchant, and is in accordance with the usage of bankers.

2. A cheque bearing the signatures of all or any number of the partners: *à fortiori* of a proper majority acting *bonâ fide*.(s)

3. A cheque, bearing the name or style of the firm, in the handwriting of any one of the partners.

4. A cheque signed by one of the partners, thus—“A., B. and Co., per procuration of A.”(t)

*5. A cheque signed by a partner, stating himself to sign for [*45] self and the rest of the partners.(u)

If the name of the firm be inaccurately stated, it would seem that the banker ought not to cash the cheque without inquiry; for such a defect would probably be considered by a jury as sufficient to awaken the suspicion of a prudent man, unless it were shown that such departure from the proper style was habitual, on the part of the member of the firm, in whose handwriting the cheque had the appearance of being drawn, or unless it were agreed upon, between the banker and the partnership, that he should honour cheques so drawn. On the other hand, without such inaccuracy having been usual, and in the absence of any agreement, it would seem that a banker would be justified in refusing payment, because it is probable the courts would hold such cheque not to bind the partnership, if it were drawn by one partner without the authority of the rest, express or clearly implied.(x)

(r) Per Lord Mansfield, C. J., *Hope v. Cust*, 1 East, 53 (cited); Collyer on Partn. 334.

(s) As to majority binding minority in partnership, see *Const v. Harris*, Turn. & R. 516; *Taylor v. Hughes*, 2 Jo. & L. 24; *In re Vale of Neath Brewery*, 1 De G. & S. 771; 1 Mac. & G. 240.

(t) *Williamson v. Johnson*, 1 B. & C. 149. It is not uncommon for clerks to be empowered to draw cheques in the name of the firm, but the clerk in such case is not liable on the cheque. See *Wilson v. Barthrup*, 2 M. & W. 866. Nor could he therefore sue. *Driver v. Burton*, 17 Q. B. 989.

(u) *Ex parte Buckley*, 14 M. & W. 469. As to deed so executed, see *Smith v. Winter*, 4 M. & W. 454; *Burn v. Burn*, 3 Ves. 573.

(x) See *Kirk v. Blurton*, 9 M. & W. 284; *Sheppard v. Dry*, reported Byles on Bills, 32, n. (6th edit.); per Tindal, C. J., *Bawden v. Howell*, 3 M. & Gra. 641; *Coll. Part.* 268, 270; *Wintle v. Crowther*, 1 C. & Jer. 310. N. B.—The law as laid down

A question may arise, whether one partner could not bind the partnership, by signing the names of all the partners, though the style of the firm did not consist of those names,(y) and without special authority.

[*46] So strong is the rule—payment to one of several partners *of a debt due to the partnership is payment to all,(z)—that even after a dissolution of partnership, of which the bankers have notice, and though a person has been appointed by the joint assent of all the partners, and with the knowledge of the bankers, to receive the debts of the partnership, unless there be something in the notice which expressly takes away the power of any one partner from receiving a debt due to the partnership, the bankers may honour the cheque of any one, and will be discharged.(a)

If one of two partners opens an account with a bank in his own name, this is not conclusive to show the account to be his solely; the banker may prove that the partner was acting as agent for the firm, in so opening the account, but the mere fact of the money deposited being partnership property is not sufficient to show that, in an action by the other partner for dishonouring his cheque.(b)

What has been said respecting partners signing cheques relates only to persons who are known to the bankers to be members of the firm, and not to partners who are not so known; for a banker would not be bound to honour the cheque of a dormant partner, whom he was ignorant to be jointly interested in the fund with the others, although he were satisfied of the genuineness of the signature, and he could not, therefore, safely do so until he had got the authority of the firm.(c)

The name in the pass-book is not conclusive that the bankers contracted with that person *alone*.(d)

Where two houses of business are partners in a particular transaction and have a joint sum to the account of the transaction in the hands of a bank, payment of the cheque of one house, out of that fund, is payment to both.(e)

[*47] *Corporation.—When a corporate body has a deposit at a banker's, it is in accordance with strict principles to lay down, that the bankers would not, at common law, be discharged by payment of a cheque that was not under the common seal, or signed by some officer of the corporation, whose signature the bankers were authorized to honour, by authority expressly given, in an instrument under the common seal; but in most cases of statutory corporations power is given to three directors, or to a finance committee, or to other officers or per-

in *Kirk v. Blurton* was disputed by *Martin, B.*, in *Forbes v. Marshall*, *Exch.*, May 24, 1855, *MS.* See also *Faith v. Richmond*, 11 *A. & E.* 339.

(y) *Per Maule, J.*, *Norton v. Seymour*, 3 *C. B.* 792. But semble, that the authority of a partner is to use the name of the firm as a signature, or to sign his own; but that the common law forbids the signature of another person's name to a document intended to have a legal effect, except the signature be expressed "*per procuration*."

(z) *Anon.* 12 *Mod.* 446; *per Tindal, C. J.*, 3 *Moo. & P.* 555; *Duff v. East India Company*, 15 *Ves.* 198.

(a) *Porter v. Clay*, 6 *Mau. & S.* 156.

(b) *Cooke v. Seeley*, 2 *Exch.* 749.

(c) See *per Parke, B.*, *Cooke v. Seeley*, 2 *Exch.* 749.

(d) *Sims v. Bond*, 5 *B. & Ad.* 389.

(e) *Coll. Part.* 455.

sons designated in the act, to draw and sign cheques, &c. In such cases the cheques ought to bear the signature (and, where that is required, the countersign) of all the parties designated. Thus, without a special enactment, the signature to a cheque, of the chairman of the finance committee of a railway or other incorporated company would not be valid; the committee not being a partnership nor a corporation, all the members ought to sign; and in the absence of an agreement binding on the corporation, that the bankers should honour cheques signed in some other specified manner, they could not safely do so. Nor could the payee recover against the corporation. Thus, where a statute gave power to three directors to sign, &c. and the cheque, on which the company were sued, was in fact signed by three persons, who, it was proved, were directors of the railway, but they did not state themselves to be directors on the face of the cheque; there, although it was countersigned by a person who added the word secretary to his name, and who seems to have been secretary to the company, and although the company had funds in the bank, upon which the cheque purported to be drawn, and it was impressed with a stamp containing the name of the corporation, plaintiff failed. It is true, there were the strong circumstances that it was intended to effect the payment of a sum of the company's money, to a third party, in fraud of the company, and in violation of the special act; but it seems probable that in the absence of these latter facts, the judgment would have *been the same, viz., that it was not a [*48] cheque purporting to be a cheque of the company, and was not binding on them.(f)

It seems to be unsettled whether a cheque drawn in the above mode, or in a mode having similar peculiarities, might or might not be good to bind the corporation, if it were shown, which was not done in the above case, that they had been in the habit of recognizing cheques, drawn in exactly the same form; but the better opinion seems to be that, however this might be decided if the question came before the court clear of any circumstances of fraud or dishonest intention, at any rate they would not be bound by a cheque concocted as part of a dishonest transaction,(g) though it might, on the face of it, conform to the appearance of others, to which it was their practice to give credit.

Having thus seen in what circumstances it is incumbent upon bankers to cash cheques, next:—

As to refusal.—If a banker, having presented to him within banking hours a cheque, bearing the genuine signature of a customer whose funds in the bank at the time are sufficient to pay the amount drawn for, refuse to pay, he is liable in substantial damages to the drawer;(h) but it will be a good answer to *an action to recover damages*, if the banker can convince a jury that, although he had, in point of fact, funds of the drawer's in his hands, at the time of presentment of the cheque, yet

(f) *Serrell v. Derbyshire, &c., Railway Company*, 19 L. J., C. B. 371.

(g) See S. C., per Cresswell, J., compared with observations of Maule and Talford, Js.; see *Barber v. Gingell*, 3 Esp. 60; see also *Levy v. Pyne*, Car. & M. 453; *Ball v. Morrell*, 12 A. & E. 745.

(h) *Rolin v. Steward*, 14 C. B. 595.

that such funds had not been paid in, long enough, to have been in his hands, for a reasonable time, before the presentment. What is a reasonable time before presentment must be ascertained by the jury, in each case, by reference to its particular circumstances; *ex. gra.*, the general magnitude and [*49] extent of *the business at the bank, the pressure of business at the time, or on the previous part of the day in question, &c., &c. (i)

The courts take judicial notice of what are banking hours in the city of London. (k) What are banking hours in other parts of the metropolis, and in provincial towns, must be proved in each case in which the question becomes material.

Also it is a defence to such action, that the drawer's assets have been exhausted, by the payment of bills accepted by him, payable at the bankers'; and it is not necessary for the bankers to show any special authority or any further order, than that contained in such acceptances, to enable them to pay the amounts due upon the bills, (l) without giving a right of action for dishonouring cheques presented subsequently.

The following case (m) may serve to illustrate the principles above laid down. On a certain day A. had standing in his name at his bankers' a balance of 69*l.* 16*s.* 6*d.* About one o'clock the same day 40*l.* was paid into his account; a little after three o'clock, a cheque drawn by him was presented for payment, the sum being 87*l.* 7*s.* 6*d.* A clerk, after referring to a book, said there was not sufficient assets, but that the cheque might probably go through the clearing house. The cheque was paid on the following day. At the trial of an action, brought by A., against the bankers, no actual damage was proved against the bankers; and the jury found for the plaintiff, with nominal damages; but the court granted a new trial, on the ground that the plaintiff was entitled to real and substantial damages.

Within what Time after it is received, by the Payee, a Cheque ought [*50] *to be presented for Payment.*—Somewhat *different considerations arise in this respect, according to the character of the parties, between whom, the question is raised.

1. *As between the payee and the drawer*, the rule is, that the drawer is not discharged, that is, the payee does not lose his remedy against the drawer, by reason of non-presentment within any prescribed time, short of six years after taking the cheque, unless the insolvency of the banker have taken place in the interval; that is, unless the result of allowing the payee to recover, would be an actual loss to the drawer, who has done nothing to cause the selection of him, as the one of the two parties, having no concern in bringing about the loss, on whom it is to fall. Between these parties, therefore, it is only in case of the intermediate insolvency of the banker that the cheque can become stale, (n) all other

(i) *Whitaker v. Bank of England*, 6 Car. & P. 700; S. C., 1 C. M. & R. 744; *Marzetti v. Williams*, 1 B. & Ad. 415.

(k) *Parker v. Gordon*, 7 East, 385; *Jameson v. Swinton*, 2 Taunt. 224.

(l) *Kymer v. Lawrie*, 18 L. J., Q. B. 218.

(m) *Marzetti v. Williams*, 1 B. & Ad. 415; so *Rolin v. Steward*, 14 C. B. 595.

(n) *Alexander v. Burchfield*, 7 M. & Gra. 1067; per *Pollock, C. B.*, *Griffiths v.*

circumstances remaining unaltered. Still the payee of the cheque must bear in mind, that he may be put to much trouble and inconvenience, by his neglect to present the cheque within a reasonable time, (which is generally considered to mean within the banking hours of the day after it is received,^(o)) because bankers in general understand it as a rule of business not to pay old cheques without inquiry; also a banker cannot safely pay a cheque, the drawer of which has died, between the date of delivering the cheque and its presentment, because his death operates to withdraw the banker's authority to pay:^(p) also, although the drawer *be still living, his account may have been overdrawn, or he may [*51] have ceased to have an account with the banker in the interval; and, in either of the three last cases, the payee might be obliged to resort to an action to recover the value. Again, the drawer might in the interval have become bankrupt or insolvent, in neither of which cases would it be probable that the payee would recover the full value.

On the other hand, although where the payee keeps the cheque, beyond a reasonable time, without presentment, and the bankers become insolvent in the mean time, the drawer is discharged; yet, if within banking hours of the day after he receives the cheque, the payee presents it, and finds that the bankers have become insolvent, between his receipt of the cheque and the carrying it for presentment, the drawer is not discharged, and the payee may recover; for here, though both parties are innocent, yet it is just that the payee should be paid his debt, the right to which he has done nothing to forfeit, since he has conformed to the strictest rule that applies to any holder of a cheque, by presenting in the course of the day after his receipt of it.^(q)

2. *When the person, who holds the cheque, is not the payee*, but has received the cheque from the payee or from some intermediate holder, and upon the cheque being dishonoured seeks to recover from the person from whom he received it, the rule is strict that he must present it within banking hours, on the day following that on which he received it, at the farthest, provided there are the ordinary means of doing so.^(r) And the holder of a cheque, whether payee or other holder, does not obtain any more time by sending the cheque to his own bankers and presenting through them; but in all cases, to be safe, he must present within bank-

Owen, 13 M. & W. 64. In *Serle v. Norton*, 2 M. & Rob. 401, the cheque was dated 19th March, and was presented 6th April following. See *Robinson v. Hawksford*, 9 Q. B. 52.

(o) *Per Littledale, J.*, *Boddington v. Schlenker*, 4 B. & Ad. 752; *Pocklington v. Sylvester*, reported Chit. Bills, 274, (6th edit.)

(p) *Tate v. Hilbert*, 2 Ves. jun. 118. The banker would be justified in paying if, at the time, he had no knowledge of the death, S. C. In case of non-payment on ground of intervening death of drawer, the holder may have relief in equity against the banker. *Rodick v. Gandell*, 12 Beav. 325; S. C., 1 De G. M. & G. 763. N. B.—The death of the drawer of a bill of exchange has no effect to vary, in any way, the rights and liabilities of the parties to the bill, *Billing v. Devaux*, 3 M. & Gra. 571, 573, 574; which is another point in which bills of exchange differ from cheques.

(q) *Pocklington v. Sylvester*, C. P., Hil. T., 57 Geo. III., reported Chit. Bills, 274, (6th edit.); *Boddington v. Schlenker*, 4 B. & Ad. 752.

(r) *Moule v. Brown*, 4 Bing. N. C. 268; *Robson v. Bennett*, 2 Taunt. 388.

[*52] ing hours, of the day next after the day, of the delivery of *the cheque to him, whether he presents it himself or by a servant, or through his bankers.(s) There is, of course, nothing to prevent the drawer agreeing with the payee to extend the time for presentment, by his assent, either express or implied.(s) On the other hand, the payee, by transmitting a cheque on another bank to his own bankers, has not less time to present it in than he would have had if he had kept it and presented it himself; and although the bankers do not send it to the clearing house the same day, the drawer is not discharged.(t)

Notwithstanding what has been stated above, from the decided authorities, founded on cases which have already come before the courts, there can be no doubt that the drawer would not be discharged, if the payee could show, that although he had exceeded a reasonable time in presenting the cheque, still at no time between the delivery to him of the cheque and the stopping of the bank, had the drawer assets in the bankers' hands to cover the amount of the cheque; or if he could show, that from the distance from the bankers' at which he received the cheque, or the lateness of the hour or other circumstances, he could not have presented the cheque so as to anticipate the stopping of the bank, even though he had actually exceeded the prescribed period of the banking hours of the next day, &c. The payee does not lose his right to recover, as has been already observed, by the stoppage of the bank within the prescribed period, provided his presentment, though subsequent to the stoppage, is within the period. Also, if it could be shown, that the bank had stopped, to the drawer's knowledge, at the time of his delivery to the payee of the cheque, probably no actual presentment need be proved, in order to render the drawer liable. So the drawer would be held liable, if it could be proved that he had reduced his account with the banker, [*53] below the amount of the cheque, before the closing of *the bank, on the day after his delivery of the cheque, or perhaps at any time before presentment.(tt)

Whether the plea of the Statute of Limitations would be a good answer to an action by the payee against the drawer has never been decided; but it seems that such defence, in case of a cheque, presented more than six years after delivery to the payee, might perhaps be taken under the plea of the statute.

As some guide with respect to presentment of cheques on provincial bankers, the following case may possibly be usefully detailed.

A cheque for 4,374*l.* was given on the 20th of April, in payment for an estate, to A., at Lutterworth, drawn on the Lutterworth bank. It was received, by the payee, after banking hours. A. lived three miles from Lutterworth, and he handed the cheque to B., to be carried to Rugby, and placed to H.'s account with the Rugby bank. Rugby is six miles from Lutterworth. On the arrival of the cheque at Rugby, the bank had closed, but the cheque was deposited, with one of the partners

(s) *Alexander v. Burchfield*, 7 M. & Gra. 1061.

(t) *Boddington v. Schlenker*, 4 B. & Ad. 752.

(tt) *Boehm v. Stirling*, 7 T. R. 429. So if he had in the meantime ordered the bankers not to pay. *Watson v. Poulson*, 15 Jur. 1111.

of that bank, for the night, and in the morning of the 21st of April, it was paid into the bank, and on the same day was transmitted, by post as the most advisable mode, to the Lutterworth bank, with orders to send the amount to London. The Lutterworth bankers received it early on the 22nd, and at half-past one, P. M. on that day, they stopped payment, without having cashed the cheque. A Court of Equity held that the deposit of the cheque, with the Rugby bankers, was a reasonable and proper course, on the part of A., and consequently, that the presentment to the Lutterworth bank, was in time to prevent the cheque from becoming his cheque, and that the debt was still due to him. The Rugby bankers, it was considered, had the whole of the 22nd to present the cheque in.^(u) Here looking to the *various circumstances, it [*54] might well be considered that the payee did not receive the cheque until the 21st, for he did not receive it, so as to make it available, until that day, and he was entitled to pay it into his bankers, or to send it, with the intention that it should be deposited, in the bank at Rugby, for the night: as it would not there be exposed to many risks, which it might have been liable to, in his own house; and then the bankers at Rugby had the whole of the next day, after their receipt of it, to present it in. Also, it will be observed, that the case falls within the first of the above rules; for supposing that the payee did not present the cheque, within the next day, after that on which he received it, still the stoppage of the bank did not occur, in the interval between the receipt of the cheque and the presentment, and consequently the drawer remained liable. This decision may, therefore, be rested on this latter principle, independently of the peculiar circumstances of the case. But probably the proper meaning of the strict rule, as to presentment by the bearer, is that the period of—"the day after the receipt of the cheque by the bearer"—only begins to run from the day, on which it was first possible for him to have presented the cheque; so that if a person receives a cheque too late for presentment to-day, under no circumstances can he have less than the whole of to-morrow and the next day, for presentment; in other words, that "day" means "day available for presentment;" otherwise a person who received a cheque on a Sunday, dated on that day, would only have the whole of Monday, to present it in; and a person who received a cheque, after banking hours, on a Saturday, must bear the loss, if the banking house did not open on Monday. It would seem reasonable, however, to consider that he first received the cheque, in each case, on Monday before banking hours commenced, and that he had therefore, the whole of Monday and Tuesday to present it in; and so if any other acknowledged public holiday intervened. To hold otherwise would either materially interfere with the convenience of the system *of payment by cheques, or would lead parties into incurring [*55] the risks of giving and taking post-dated cheques.^(x)

The following is a case of the same class as the one last detailed:—

(u) Bond v. Warden, 1 Coll. Ch. C. 583.

(x) It has been observed from the bench, that a man who drawn a cheque on a Sunday, usually dates it for the Monday. Per Alderson, B., Watson v. Poulson, 15 Jur. 1112.

On the 5th April defendant paid to the plaintiffs, who were bankers, a cheque drawn on the Maidstone bank; it was given to the plaintiffs at the time of the Tunbridge market, and they gave their own bank notes in exchange; they received it, at Tunbridge, some time before the post set out on the 5th. Plaintiffs kept it all the 5th and 6th, but sent it to Maidstone, by the carrier, on the morning of the 7th; the carrier reached Maidstone at nine o'clock on the 7th, but the Maidstone bank did not open on that day. If the cheque had been sent by the post, of the 6th, it would have reached Maidstone an hour earlier. At the trial Gibbs, C. J., said, "the plaintiffs cannot recover; they have been guilty of laches: I will not say that it was not their duty to have sent off the cheque by the post of the 5th, but the extreme time, up to which they were justified in keeping it, was till the post of the 6th. It does not matter when the carrier arrived; they must suffer for their negligence." (y)

The extreme time here mentioned, it will be observed, is limited in accordance with the latter part of the second rule, by which the bearer or holder of the cheque must present, in the banking hours of the day, after that on which, he received it, *if there are the ordinary means of doing so*. In the above case the judge seems to have declined saying expressly, that, considering the hurry of a market day, the bank was bound to have sent the cheque, by the post of the 5th, (though, on the other hand, he would not lay down that it was not their duty,) so as to have presented on the 6th; but, as they did not take the means of the post of the 6th, of making what may be called an inchoate presentment [*56] *on the day after they received it, the loss arising from the stoppage of the Maidstone bank, in the interval between the receipt and presentment, fell upon them.

We shall detail another case of this class.

The plaintiffs were bankers at Aylesbury. At noon, 13th June, they discounted for the defendant a cheque that he had received in payment, for cattle, from some salesmen in Smithfield, London. It was drawn, in his favour, on Smith and Co., bankers, London. The post for London left Aylesbury at 6 P. M., but plaintiffs did not send off the cheque by that day's post, but by a coach which started at 8 A. M., of the 14th. The cheque was inclosed to Praed and Co., bankers, Fleet-street, who received it between three and four o'clock the same day. They presented it at Smith's about 11 A. M., on the 15th. The answer was, "No effects—must see the drawers." The action was for money had and received to recover the sum of 300*l.* paid by the plaintiffs on the cheque to the defendant, and they had a verdict. (z) Here the defendant, choosing to discount the cheque in the country, was considered to have assented to that being done which was the usual and necessary course to procure payment of the cheque; (a) and it appears to be the invariable usage, in the city of London, for bankers not to present cheques, paid in by their customers, until the day following that on which they are received, un-

(y) *Beeching v. —*, Holt, N. P. Rep. 315.

(z) *Ruckford v. Ridge*, 2 Campb. 537.

(a) *Alexander v. Burchfield*, 7 M. & Gra. 1061, 1066.

less drawn on bankers eastward of Temple Bar, being members of the Clearing House, in which case they are exchanged the same day.^(a)

The following case may properly find a place here, though it is less closely connected with this part of our subject.

On the 17th November, A. asked B. to give him change for a cheque for 10*l.* 10*s.*, drawn by C. on W. and Co., bankers, in whose hands C. had funds sufficient to cover the amount. B. gave the change, and kept the cheque till the 21st November, when he paid it into *his* bankers. On 23rd *November, W. and Co., stopped payment, without having cashed the cheque. On the evening of that day B. told [^{*57}] A. that the cheque had been *returned*, not telling him that W. and Co. had stopped, which A. did not know. A. gave B. 5*l.* and an I. O. U. for 5*l.* 10*s.*, and took back the cheque. Held, that the suppression of the fact by B. that W. and Co. had stopped, &c., amounted to such a fraud on A. as entitled him to recover the 5*l.* as money had and received, and that to entitle him to do so it was not necessary that he should have given or tendered back the cheque to B., Lord Denman, C. J., saying the cheque was not *returned*, in the ordinary sense of the word.^(b)

The *Presentment* must in general be made, not only within banking hours, but at the banking-house, of the bankers, on whom the cheque is drawn. But the institution called the Clearing House, and the practice of using it, which is now very general, though not universal, among the bankers of the metropolis, has introduced a small divergence from the rule, which it may be worth while to notice.

The *Clearing House* is a large room fitted with drawers: each banker, using the house, has one of these, marked with his name or firm. In the morning, and at half-past three o'clock in the afternoon of each week day, a clerk from each banker, using the house, attends, bringing with him the cheques on other banks that have been paid into his bank since last clearing; these he deposits in the drawers of the respective banks on which they are drawn; he then credits their accounts separately, with the different amounts of the cheques they have placed in *his* drawer, as against his bank. Balances are then struck from all the accounts, and the claims between the various banks transferred from one to another, until they are so wound up and mutually cancelled, that each clerk has only to settle, in cash, with two or three *others, and thus, by [^{*58}] means of comparatively small sums in money, the balances are immediately paid. When cheques are paid into a bank after clearing time,^(c) they are sent to the respective houses on which they are drawn, when, if the bankers intend to pay them, they are "marked," which is understood, as an engagement that they will be passed or paid, at the Clearing House next day,^(d) and that they have priority before the cheques which come in, on that day.^(e)

(a) *Alexander v. Burchfield*, 7 M. & Gra. 1061, 1066.

(b) *Billing v. Ries*, Car. & M. 26.

(c) See 4 B. & Ad. 754.

(d) *McCulloch*, *Comm.* Dict. *voc.* Clearing House; see 4 B. & Ad. 753; *Warwick v. Rogers*, 5 M. & Gra. 348; *Robarts v. Tucker*, 16 Q. B. 570; *Bellamy v. Majoribanks*, 7 Exch. 389.

(e) *Robson v. Bennett*, 2 Taunt. 388; *Stevens v. Hill*, 5 Esp. 247.

From this practice, as above detailed, it is obvious that a large portion of the cheques which are paid into banks in London by customers, in order that the amounts may be carried to their accounts as money, are never presented by such bankers, as bearers, at the banking houses, on which they are drawn; but that, instead, is established the practice of placing them in the drawers, at the Clearing House, belonging to the latter banks. In other words, they are presented to the clerks of the latter, who attend at the Clearing House; and such presentment has been held to be sufficient.^(f)

The following case illustrates both branches of the practice. On September 11, between one and two o'clock, the plaintiff received from the defendant a cheque on the defendant's bankers, Bloxam & Co.; the plaintiff lodged the cheque at his bankers', Messrs. Harrison, a few minutes after four, and they presented it between five and six to Bloxam & Co., who marked it for payment. The practice was proved to be as above stated. On the 12th Harrison's clerk took the cheque to the Clearing House, but no one attended on behalf of Bloxam & Co., who had stopped payment at nine that morning. The cheque was therefore treated as dishonoured. The plaintiff, in going with the cheque to Harrison's, passed Bloxam's banking house. The court held the marking [*59] to be *similar* to the accepting *of a bill; for it was an admission of assets, rendering the banker liable to pay, and the same thing as if the banker had written on the cheque, "We will pay this to-morrow at the Clearing House." Thus, the presenting it at that place is equivalent to presenting it at the banking house, and there was consequently no laches in the plaintiff or his banker, and the plaintiff had judgment against the defendant.^(g) It will be observed that the court term the marking "to be similar to the accepting of a bill, &c." Now, however, the statute 1 & 2 Geo. IV. c. 78, s. 2, passed subsequently to the above decision, enacts, that no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be, in writing, on such bill. At the date of the above decision the law had been held to be, that a *verbal* acceptance of a bill of exchange was binding.^(h) Hence that decision must not be taken as extending, at the present day, to make *any* marking an acceptance according to the requirements of the statute of Geo. IV.; such marking only, as amounts to a writing, will be so. Signature is not essential to acceptance of a bill under that statute; but if the word *accepted* be written on the bill, it is a question for the jury whether the word was intended as a definitive acceptance, or whether it was to be subsequently completed by signature.⁽ⁱ⁾ This has been ruled with respect to a bill of exchange. And, probably, if it were proved that a banker had deliberately marked a cheque by the word "accepted," or even by the letter A., or by his initials, or by the initials

(f) Reynolds v. Chettle, 2 Campb. 596.

(g) Robson v. Bennett, 2 Taunt. 388. That cancelling is similar to acceptance, see *infra*, p. 60; but compare p. 66.

(h) Lunley v. Palmer, Stra. 1000; Rep. temp. Hardw. 74, S. C.

(i) Dufaur v. Oxenden, 1 Moo. & R. 90; per Parke, B., Corlett v. Conway, 5 M. & W. 655.

of the names composing the firm, and it were shown to be the usage or practice of the firm to pay cheques so marked, the bearer could recover against the banker, who, after such marking, with the knowledge of the bearer, refused to pay.

If the bearer banks with the same bankers on whom the *cheque is drawn, no promise to pay can be implied from the [*60] bankers receiving the cheque without observation, and keeping it till the following day; for *primâ facie* they will be taken to have received it as agents to the bearer.^(k) At least they will be so, where they had no funds of drawer's, in their hands, at the time.

But in a case where A. and B. severally kept accounts, at the same bank, and A. pays in a cheque, in his favour, drawn by B., who was, at the time, considerably indebted to the bank, and the bankers received the cheque without observation, and on the same day received moneys on account of B., and paid cheques drawn by him, and on the next day received moneys on his account, but in each case appropriated those moneys to other claims upon B., and they had written to A. saying that they had not carried the cheque to his credit, but would retain it, by them, in the hope of its being provided for, and promised B. that they would pay it when they had funds; it was held, A. might recover from the bankers the amount of the cheque, in an action for money had and received,^(l) the bankers having had funds of B's in their hands subsequently to the receipt of the cheque, sufficient to have paid it, but for their appropriation of them to other claims on him.

The *cancelling* above spoken of, seems to have been understood by the witnesses in the different cases, and by the courts, as meaning *marking as for payment*; but by statute 55 Geo. III. c. 184, s. 19, it is imperative on every banker who pays a cheque, to *cancel* it, under a penalty of 50*l.*; this sort of *cancelling* means crossing with lines.

The following case may properly close this part of the subject:—

Three customers of bank A. draw three several cheques *upon [*61] it, and pay them away to creditors; all the three having, at the time, considerably overdrawn their respective accounts. These cheques came into the hands of another bank B., who mark them as paid, (in other words cancel them,) and enter the amounts to the debit of the drawers severally. B. remit to A. the cheques, inclosed in a printed circular, desiring the amount of them to be paid to the London correspondents of B. However, notwithstanding this circular, the practice between the two banks is, to pay one another's cheques, so far as circumstances permit, by remittances of notes of the bankers sending the cheques, directed to these bankers, the understanding being, however, that the cheques should be paid on the day on which they are received, or on the day following, either by such remittances, or by remittances according to the circular. A. gave B. credit on their books for the amount of the cheques, but stopped payment three days after receiving

(k) *Boyd v. Emmerson*, 2 A. & E. 184; see *Kilsby v. Williams*, 5 B. & A. 816; *Clark v. Adair*, cor. Lord Mansfield, cited 4 T. R. 343; *Stevens v. Hill*, 5 Esq. 247; *De Bernales v. Fuller*, 14 East, 590, n. (a), 598.

(l) *Kilsby v. Williams*, 5 B. & A. 815.

them, and without having made any payment or remittance in respect of them, knowing, at the time, of receiving the cheques, that their bankruptcy was inevitable. The dates were as follows:—On 14th July the cheques were sent to A., who got them on the 15th (as it seems in the morning;) through that day and the 16th, they went on doing business as usual; they never opened after the 16th. It seemed indisputable, that if the largest of the three cheques had been presented on that day, by a stranger, for payment over the counter, they would have paid it, because the drawer had given them security, sufficient to cover all he was previously in their debt, *plus* the amount of that cheque. The assignees of the firm A. obtain payment, from the customers, of the full amount of the cheques. Held, that B. were entitled to payment, in full, of the amount, out of the bankrupts' estate, and that A. ought either to have remitted the money on the 15th or 16th to B., or to the London correspondents of B., or have returned the cheques to B. *(m)*

[*62] **Stale Cheque*—It is well settled, and may be regarded as a fixed rule, that the indorsee of an ordinary bill, or note, takes it with the equities that attach to it, in the hands of the person, from whom he received it; but whether the bearer of a cheque is affected by the same rule, seems to have been laid down, with some variation, at different times.

In a case where a cheque for 50*l.* was casually lost by the payee, and it was tendered, five days after its date, in payment for goods at a shop, and the shopkeeper took it and gave change out of it, and next day presented the cheque and received cash for it, and a verdict was found for the payee, in an action for money had and received against the shopkeeper; the court treated cheques as, on the same footing in this respect, as bills and notes, holding that the person tendering the cheque, not having any title, could not transfer a title. *(n)* But in a later case, where the cheque had been fraudulently obtained from the drawer, and a trading firm, to whom it was handed, six days after date, had given cash for it, and afterwards presented it and received the amount at the banker's, the drawer failed to recover against the trading firm, in an action for money had and received, and it was said not to be true, as a matter of law, that a party taking a cheque overdue has it with the same title, and no other, as the person from whom he receives it, though the rule, it was allowed, was certainly so with respect to bills of exchange and promissory notes. *(o)*

The rule is said, in a work of great authority, *(p)* to be generally applicable to cheques on bankers, but that it will not apply to cheques which appear to have been issued long after their date. There is an obvious distinction between a bill or note having a fixed day for pay-

(m) Ex parte Cole, 3 M. D. & D. 189, 197, per Knight Bruce, V. C.

(n) Down v. Halling, 4 B. & C. 339, cor. Abbott, C. J., Bayley, Holroyd, Js.

(o) Rothschild v. Cornely, 9 B. & C. 389, 391, per Lord Tenterden, C. J., Littledale, J.

(p) Bayley, Bills, cap. v. s. 3, citing Boehm v. Sterling, 7 T. R. 423, where the court say of cheques, that the equities of the parties are the same, as with regard to bills of exchange.

ment, which is taken *when over due, and a cheque found in circulation long after its date; in the first case, suspicion of [*63] necessity attaches; in the latter, suspicion may or may not justly arise, according to circumstances; whether it does, is for the jury to say; the staleness of a cheque may be a ground on which they may infer fraud; but there does not seem to be any rule of law which points out, any given degree of staleness, as evidence conclusive on that point.(g)

So gross negligence may be considered, by the jury, to be shown in the circumstances under which a person takes a stale cheque as cash; viz., negligence of the duty, which those circumstances imposed upon him, of inquiring into the connection between the bearer and the parties named on the cheque, and if he has been guilty of such negligence, they may consider him to have been a fraudulent taker; but no rule of law, it would appear, lays down, with respect to such a cheque, what has been formerly laid down, in the case of a party taking a promissory note after the date at which it was made payable in the body of it; that the taking it, after it was due, is a suspicious circumstance, from which the law infers that the taker had knowledge, of some infirmity in the title of the holder, and therefore takes it, subject to all the objections to which it was liable, in the hands of the person from whom he took it.(r) On the contrary, it is now definitively settled, that if a man take *honestly* an instrument made payable to bearer, he has a good title to it, with whatever degree of negligence he may have acted that is consistent with the idea of his honesty; his negligence may have been gross; the jury may thence infer his fraud; thus the proposition becomes altered, and of course the *fraudulent* taker of a cheque acquires no title. Still gross negligence *only* would not be held, by a court, at the present *day, to be a sufficient answer, where the taker had given consi- [*64] deration. Gross negligence may be evidence of mala fides, but it is not the same thing.(s)

Still there may be such gross negligence as to render bankers liable, without any imputation of fraud or mala fides; thus, where a customer's cheque was presented, which had evidently been torn in pieces, and pasted together again, the bankers having paid the cheque, were held liable to the drawer. Here the negligence consisted, apparently, in want of inquiry, to see whether the drawer had not revoked the cheque, which its appearance indicated he had done.(t)

The rules and practice with respect to the limits of time, beyond which, in certain cases, presentment of a cheque ought not to be made, have been stated; it remains to observe,* on the other hand, that *bankers are not justified in paying a cheque which is presented to them, before the day on which it purports to have been drawn, or bears date,*

(g) See *Dehors v. Harriott*, 1 Show. 164; *Brown v. Davies*, 3 T. R. 80; *Taylor v. Mather*, id. 83, n.; *Sturtevant v. Forde*, 4 Sc. N. R. 670; *Banks v. Colwell*, cited 3 T. R. 81; per *Parke, B.*, 9 M. & W. 17, 18.

(r) *Amory v. Mereweather*, 2 B. & C. 578.

(s) *Goodman v. Harvey*, 4 A. & E. 870; *Uther v. Rich*, 10 A. & E. 784; *Byles on Bills*, 126, (6th edit.) These cases seem to overrule *Snow v. Peacock*, 2 Car. & P. 221.

(t) *Scholey v. Ramsbottom*, 2 Campb. 485.

for by so doing they render themselves liable to the penalty of 100*l.*, imposed by the Stamp Act, as above stated,^(u) for paying a post-dated cheque; but besides, in circumstances, they may be liable to pay over again the amount of the cheque, *ex. gra.*, if it have been lost by the payee, the banker must repay him, it being out of the usual course of banking business, to cash cheques, before the day of the date;^(x) at least the banker would be liable to do so, if the payee could show that he took the cheque, not knowing that it was post dated; otherwise, being forbidden by the Stamp Act (passed since the decision last referred to, which dates A. D. 1776,) under a penalty, to take such a cheque knowingly, he would *not be able to recover. The banker, however, [*65] is besides, prevented by the express words of the statute, from being allowed the amount of the cheque in account with the drawer, &c.

On the other hand no days of grace are allowed on presentment of a cheque.^(y)

Cheques drawn, by the Treasury, on the Bank of England, are not payable after three o'clock P. M.^(z) and they usually bear a memorandum, to this effect, printed at the top of the paper on which they are drawn.

A cheque of the ordinary kind is strictly payable, or at least intended to be paid, immediately on demand; and this appears to be universally the case, with the exception of cheques drawn on bankers in the city of London, where the usage of trade establishes the rule, that a cheque may be retained by the banker, on whom it is drawn, until five o'clock P. M. of the day on which it is presented, and if there be no assets, it may then be returned to the person presenting it, and that too, although it have been, in the first instance, by mistake cancelled, as intended to be honoured. Thus, where plaintiff paid into the bank of V. & Co. a cheque drawn upon defendant's house, and V.'s clerk took it to the Clearing House to be paid, and put it into defendant's drawer, and received it back before five o'clock cancelled, but with memorandum, *cancelled by mistake*^(a) written under, and it was proved that several cheques, drawn by the same person, had been paid, on that day, but that when the cheque in question came in, the clerk who received it immediately cancelled it, thinking it was to be paid, but finding, in a few minutes, that no more of such cheques were to be paid, wrote the memorandum above mentioned, and it was returned to V.'s clerk accordingly. Held that, notwithstanding the cancelling, the defendant, according to the usage proved [*66] at the *trial, had until five o'clock to return it, and that, having so returned it, this amounted to a refusal to pay.^(b) This case

(u) *Supra*, p. 17.

(x) *Da Silva v. Fuller*, MS., Chitt. Bills, 148, (6th edit.,) cited per Parke, B., *Morley v. Culverwell*, 7 M. & W. 178; see *Marins*, 31, (4th edit.) Quere, how the banker could be responsible to the payee? See *Story*, Bills, s. 417; *Bayley*, Bills, 326, (5th edit.) The doctrine applies where the bearer is a mere agent of the drawer who has countermanded.

(y) *Moyser v. Whitall*, 9 B. & C. 409; *Sutton v. Toomer*, 7 B. & C. 416.

(z) 4 & 5 Will. IV. c. 15, s. 21.

(a) See per Buller, J., *Lefley v. Mills*, 4 T. R. 175.

(b) *Fernandey v. Glynn*, 1 Campb. 426. n.; see *Turner v. Mead*, Stra. 416; *Hayward v. Bank of England*, Stra. 550.

shows that cancelling does not operate like acceptance, for it was further said, in the case, that had it been a bill of exchange sent for acceptance and accepted, no change of circumstances could have altered that fact.^(c)

Also knowledge of the bankruptcy or stoppage, of the banker, on whom the cheque is drawn, seems to be a dispensation with presentment,^(d) and as a banker paying a cheque without a stamp, where a stamp is requisite, is expressly prohibited from being allowed the amount in account with the drawer, and is also made liable to a penalty, it would seem that the payee, who *inadvertently* takes such a cheque, might recover against the drawer (without showing that he had presented) on the original consideration; for it would be idle to require him to show, as the condition of his recovering on the consideration, that he had presented the cheque to a person who was forbidden by law to cash, he himself being also forbidden to receive the cash for it.

When proceeding on the cheque itself the payee may sue the drawer, either in assumpsit or debt,^(e) and in general it is necessary to show notice, to defendant, of nonpayment by the bankers,^(f) but such want of notice is excused by stating and proving, that the bankers had no assets of the defendant's, and that defendant had sustained no damage for want of notice;^(g) the latter, however, of these allegations seems not to be essential,^(h) but this is not quite clear, *for there are decisions which point both ways;⁽ⁱ⁾ it is therefore safer to retain it. [*67]

Bankruptcy.—*Bankruptcy of the drawer* has been already intimated to be a good ground of refusal, by the bankers, to honour his cheques. In fact bankers stand, in no different position, as regards the laws of bankruptcy, from any other of the subjects; and, therefore, they are liable, like all other persons who pay money to a bankrupt, after knowledge of an act of bankruptcy, to be obliged to pay it over again, to the assignees. Hence, if a banker, after knowledge of an act of bankruptcy committed by a customer, nevertheless honours his cheques, the banker will be liable to repay the money to the bankrupt's assignees; for knowing of the act of bankruptcy, the bankers have imputed to them the knowledge of the legal consequence of the act, which is, to render the party no longer a free agent, and deprive him of the right to dispose of his property;^(k) they are taken to know that they were not bound to pay his cheques in such circumstances, and that, by doing so, they were aiding in defrauding the creditors.

The only remedy of the assignees seems to be the above, against the bankers; they cannot sue the creditor to whom the cheque was delivered

(c) *Fernandey v. Glynn*, 1 Campb. 426, n. In this case, as has been observed, *Cox v. Troy*, 5 B. & A. 479, per Holroyd, J., the cheque was not in reality cancelled by mistake, but with the intention to pay it: but circumstances leading the bankers to change their minds, the drawer only was liable.

(d) *Camidge v. Allenby*, 6 B. & C. 373, as explained, *Robson v. Oliver*, 10 Q. B. 704.

(e) *Simpkin v. Potheary*, 5 Exch. 253.

(f) *Treacher v. Hinton*, 4 B. & A. 413.

(g) *Kemble v. Mills*, 9 Dowl. 446.

(h) *Carter v. Flower*, 16 M. & W. 750; see 9 Q. B. 52.

(i) *Trueman v. Fenton*, 5 D. & L. 28; *Jones v. Broadhurst*, 9 C. B. 190.

(k) *Vernon v. Hankey*, 2 T. R. 119.

and the money paid on it, he not knowing of any act of bankruptcy.^(l) Nor is it a valid excuse, for the banker, that he pays to a creditor who does not know of the act of bankruptcy, to whom, therefore, a direct payment by the trader would stand good.^(m) At all events, if the assignees recover from the bankers the amount of a cheque, paid to a creditor of the trader, in the above circumstances, they cannot also recover it from the creditor, *though the creditor, when he received [*68] the money, knew of the act of bankruptcy.⁽ⁿ⁾

Crossed Cheques.—In the metropolis, and in many other places, it is a common practice for a person drawing a cheque, to write across the cheque the name of a banker, ordinarily the banker of the party in whose favour it is drawn. The *intention* of this is, to advertize the bankers upon whom the cheque is drawn, that they are to cash the cheque only to or in favour of the banker, whose name so appears written across the instrument; its legal effect we shall discover presently; the reason for adopting the precaution is to prevent its being paid to a wrongful bearer, *ex. gra.*, one who has found it, or got possession of it by fraud, &c., or felony.

If, however, a cheque so crossed is handed on to another person as bearer, there is no objection it seems to his erasing the name of the banker that he finds upon it, provided he substitutes the name of another banker.^(o)

Again, it is not unusual to write across the cheque ——— and Co., leaving a blank space on the left hand side of the word *and*, in order that it may be filled with the name of the banker, through whom the payee, or any one to whom he may pass the cheque, intends that the cheque should be presented; and when so crossed, as in the former case, the bankers on whom the cheque is drawn have been in the habit, in London and other places, of refusing cash for the cheque, if it were presented otherwise than through the banker; and so if the blank were not filled up, the practice has been, that it was only paid when presented through *some* banker.

Before entering upon the inquiry of what is the effect, as regards the legal negotiability, of a cheque which has been thus treated, it will be desirable to state that such crossing *has not the effect of affecting [*69] the bankers whose name is written across it, and into whose bank it is paid, with knowledge that the sum mentioned in it, is the money of the payee, in all circumstances. Thus, when C. drew a cheque on his banker, payable to A. and B., assignees of P., and crossed it with the name of a banker, with whom they had an account as assignees: B., who had a private account with the same bankers, paid in the cheque to that account; the court held, that the bankers were justified in applying it to that account, because, according to the usage of trade and of bankers, the crossing with the name of the payee's bankers, was no notification to them that the money was the money of the payee.^(p)

(l) *Mathew v. Sherwell*, 2 Taunt. 439; S. C., 1 Rose, 118. This case shows that a paid cheque is of no value.

(m) See *Vernon v. Hankey*, 2 T. R. 117.

(n) *Vernon v. Hankey*, 2 T. R. 287.

(o) *Stewart v. Lee, M. & Malk*. 158

(p) *Stewart v. Lee, M. & Malk*. 158.

It had been very solemnly decided that the crossing of a cheque payable to bearer with the name of a banker, whether made by the drawer or the bearer, does not restrict the negotiability of the cheque to such banker or to a banker only; but in law it operates as a mere memorandum, that the holder is to present it for payment though some banker. Such crossing being made for the protection of the owner of the cheque, the payment of a crossed cheque, otherwise than through a banker, would be strong evidence of negligence, in case the person presenting proved not to be the lawful owner of it. If it was doubly crossed, that afforded no additional evidence against the banker, in an action by the drawer for money lent to him.^(q)

There was, it was held, no obligation on a banker on whom a cheque is drawn, arising either from usage or otherwise, (in the absence of a special usage or a special agreement to that effect,) to pay a cheque only through the banker, with whose name they find it crossed in their customer's handwriting; consequently they were not liable to an action at the suit of the drawer, as for a violation of duty, if they pay it otherwise, although the drawer may have been in *consequence of such payment by them, subject to a loss, at least in a case, where [^{*70}] the drawer gives opportunity to the fraud upon him, by making the cheque payable to a person who was never intended to take the money for himself, but was in truth a mere servant, to carry the cheque to the bank, with whose name the drawer had crossed the cheque, the payee having struck out that name, and crossed the cheque with the names of his own bankers, to whom the cheque was cashed, and from whom he obtained the proceeds.^(r)

In such an action by the drawer, the jury had found that there was such a usage of bankers in the metropolis, as gave rise to a duty of the above nature, viz., a duty not to pay through other hands than into and through the hands of the bankers, whose name was written across the cheque by the drawer, but the court, on the ground that the evidence given at the trial, in support of the alleged usage, was not satisfactory, set aside the verdict for the plaintiff, and ordered a new trial.^(s) The question is of so much importance to bankers, and persons who draw or receive cheques upon bankers, that it seems desirable to state at some length the reasoning of the court in delivering judgment. It should be observed, that the drawer had crossed the cheque with the words "*Bank of England for the account of the Accountant-General.*"

"Payment by cheques, (the court observed,) has now almost entirely superseded all other modes of payment in large, and is in very general use in smaller money transactions; and the practice of crossing them with the names of bankers, the effect of which is the question in the present case, is also in very general use, and occurs in very many instances

(q) *Bellamy v. Majoribanks*, 7 Exch. 389.

(r) *Bellamy v. Majoribanks*, 7 Exch. 389. In that case the bank to whom the drawer intended that the cheque should be carried by the person named as payee was the Bank of England, whose habit was proved to be, and to be well known among the London Bankers, to reject all payments by cheques not drawn upon the Bank of England itself. The drawer seems to have been aware of their rule.

(s) *Bellamy v. Majoribanks*, 7 Exch. 389.

[*71] every day, not only in London, but in several *other parts of the kingdom. It therefore seems to us to be of great importance that the effect of these crossings should be rightly understood."

"The plaintiffs first contended that the crossing of the cheque to the 'Bank of England,' in the manner in which it was crossed, absolutely restricted the negotiability of the instrument, and rendered it payable to the Bank of England alone, and even to the account mentioned, namely, 'the Accountant-General,' and to no other person; and that a binding custom or usage to that effect was proved. We are of opinion no such usage or custom was proved. Without going the length of saying that there was no evidence to go to the jury of the existence of such a custom, we think that the weight of evidence was against it. A custom, such as that alleged in the first count, would be binding and obligatory on all persons engaged in a certain trade, because long and universally acted upon by all persons in such trade, who may, therefore, reasonably be presumed to have made their contracts upon the faith of it. The custom alleged could only be proved by a long, well-known, acknowledged and universal usage and practice among bankers to act in accordance with it. So far from this being the case, many witnesses called from the different London banking houses by the plaintiffs, and all called by the defendants, denied its existence. That there was any special usage between the plaintiffs and Messrs. Coutts, which would, of course, govern their transactions, was never once suggested. The banking business in London is not in very many hands, and all the witnesses on both sides were persons of unimpeachable integrity and veracity, and it seems to us quite absurd to suppose that there could be any custom creating such a duty as that alleged in the first count, and absolute and binding by reason of long and universal usage on all the bankers in the metropolis, without those gentlemen being well acquainted with it. The verdict was, therefore, upon this point, unsupported by the evidence."

[*72] *"We are also of opinion that such a custom, if proved to have existed in fact, would be incapable of being supported in point of law. The crossing a cheque could not operate as an indorsement to a banker, whose name is used, because it was not written with any intent to transfer the property in the cheque to him, and it wants the essential part of an indorsement, the delivery of the instrument to the indorsee. And we think that it cannot be well supposed that the usage is to be considered as equivalent to the direction by the holder or drawer to the drawee, not to pay to the bearer, but to a particular person only—for then the cheque would be altered in a manner which would take it out of the exemption of the Stamp Act, 53 Geo. III. c. 184, sched. 1, which applies to cheques payable to bearer only, and the bankers, to whom it was addressed, could not be bound to pay to the person named. We are, therefore, of opinion that the crossing the cheque, with the name of a banker, could not have the effect of restricting its negotiability to such a banker only. To hold it to have this effect, would be, to render the instrument no longer a cheque."

"As the effect of crossing a cheque is not, in our opinion, to restrain the negotiability of the cheque, it will be fit to consider what it probably

is, that the attention of the jury may be directed to that question on the new trial. It was agreed, on all hands, that the practice of crossing cheques originated at the Clearing House; the clerks of the different bankers which do business there, having been accustomed to write across the cheques the names of their employers, so as to enable the Clearing House clerks to make up the account. It was quite clear that this had nothing whatever to do with the restriction of the negotiability, for at the time when this was done, the cheques were in the course of payment there, on presentation for payment, and all their negotiability was at an end. The establishment of the Clearing House is comparatively modern, and was within the memory of several of the witnesses. It afterwards became a common *practice to cross cheques which were not intended to go through the Clearing House at all, with [*73] the names of a banker, or with the words " — & Co.," leaving the rest in blank, and a custom or usage has certainly sprung up in regard to this also. All the witnesses agreed as to the fact of the existence of such a custom, and we think that the great preponderance of evidence on both sides tended to show the custom to be that which is reported to have been stated by some of the jury in the case of *Stewart v. Lee*,^(t) namely, that, when a cheque is crossed, bankers generally refuse to pay it to any one except a banker, and if they do pay it to a person not a banker, they consider that they do it at their peril, in the event of the party to whom the payment is made not being entitled to receive it; that the object is to secure the payment, not to any particular banker, but to a banker, in order that it may be easily traced, for whose use the money was received; and that it was not intended thereby at all to restrict the circulation or negotiability of the cheque, but merely to compel the holder to present it through a quarter of known respectability and credit. We are strongly inclined to think, on a full inquiry, the usage will turn out to be no more than this; and, considering the custom in this point of view, the crossing is a mere memorandum on the face of the cheque, and forms no part of the instrument itself, and in no way alters its effect.^(u) There can be no doubt that such a usage is highly beneficial to the public."

The law was held to be, that, however general be the practice of crossing cheques with the form " — & Co.," or with the name of a banker, the negotiability of a cheque payable to bearer was not thereby affected, so that any one who took such cheque, and bonâ fide gave value for it, was entitled to the money he got for it, through his bankers, from the bankers on whom it was drawn. Hence, if a person who *had received a cheque, crossed as above, in payment of debt, sent it, by his [*74] clerk, to pay into his bankers', but the clerk, instead of doing so, got the amount from A. B., then, if A. B. acts bonâ fide, he is not liable to repay to the clerk's master the sum he gets, through his bankers, for the cheque.^(x)

(t) Moo. & M. 158.

(u) See *Fitch J. Jones*, 24 L. J., Q. B. 293, where effect of a memorandum on a promissory note was considered.

(x) *Carlton v. Ireland*, 25 L. J., Q. B. 113. The origin of crossing cheques is

Such having been adjudged to be the law on this subject, a statute has been lately passed to alter it; we have stated the law as it was, because it is always indispensable to the clear understanding of a new rule, superseding an old one, to be accurately informed of the terms of the old one. The statute^(y) is as follows:—"Whereas doubts have arisen as to the obligations of bankers with respect to cross-written drafts: and whereas it would conduce to the ease of commerce, the security of property, and the prevention of crime, if drawers or holders of drafts on bankers, payable to bearer, or to order on demand, were enabled effectually to direct the payment of the same, to be made only, to or through some banker: be it therefore enacted, &c.:

"I. In every case where a draft on any banker, made payable to bearer or to order on demand, bears across its face an addition, in written or stamped letters, of the name of any banker, or of the words 'and company,' in full or abbreviated, either of such additions shall have the force of a direction to the bankers, upon whom such draft is made, that the same is to be paid only, to or through some banker, and the same shall be payable only, to or through some banker.

"II. In the construction of this act, the word 'banker' shall include any person or persons, or corporation, or joint stock, or other company, acting as a banker or bankers."

Cashed Cheque.—Let us next consider what is the proper mode of disposing of a cheque after it has been cashed.

First, as has been pointed out, the banker must cancel it; *but [*75] is the banker, or the drawer, entitled to the possession of it? We have seen that when a cheque is dishonoured, it is "returned" in the technical phrase, with "no effects," or some words to that effect, marked upon it; (z) and this is the import of the word *returned*, as understood in this connection, among bankers and traders. When the banker hands back to the customer the cheque he has drawn, after it has been cashed, this restoration is not known as a "return" of the cheque. In fact, however, such restoration always takes place; the bankers' duty being to restore the cheque, after cashing it, to the customer who has drawn it upon him. A banker has no more right to a cheque, which he has honoured, than the payee of a bill of exchange has to the bill when paid. It is always considered that the cheque is the property of the drawer when paid. (a) and before the cheque is handed back to the drawer it is considered to be in his possession; the banker, *for this purpose*, being his agent, the possession of the banker is therefore his possession; (b) and therefore where the drawer is one of the parties to an action, a notice to

said to have been the practice of the clerks at the clearing house to write on the cheque the name of the bank that deposited it in the drawer at the clearing house. Lawson's Hist. Banking, 216.

(y) 19 & 20 Vict. c. 25, (Roy. Ass. 23rd June, 1856.)

(z) *Warwick v. Rogers*, 5 M. & Gra. 348, 349.

(a) *Per Wilde, C. J.*, 2 Den. Cr. Cas. 21; *Reg. v. Watts*, where it was shown to be the usage of Glyn's banking-house to return the cheques to the customers weekly. *Id.* 29. See case where they were returned quarterly, *Bodenham v. Purchas*, 2 B. & A. 41, 42.

(b) *Per Abbott, C. J.*, *Partridge v. Coates*, Ry. & M. 156.

produce, is all that is necessary, to get the paid cheque before the court.^(c)

This is the rule with respect to all cheques drawn in the usual mode; that is, drawn by a customer, who has deposited funds in the bankers' hands, and draws against such funds.

There may, however, be instances, but it probably may be alleged to be seldom that they occur in practice, where a cheque is drawn, with the intention that it should remain in the bankers' hands, after he has paid out the amount of it, as a kind of security for the repayment, on which he may be able, if necessary, to proceed against the customer. Such a case is the following: Two brothers, A. and B., applied to *a banker for a loan of 500*l.*; the banker agreed to lend the money, provided a third brother, C., would join them in giving security for the advance; C. agrees to this; and, in pursuance of such arrangement, A., B. and C. sign a cheque in this form, "Pay selves or bearer £500. A. B. C.," and on delivery of this cheque to the bank, 500*l.* was paid out to them. C. dies, leaving A. and B. his executors. The banker sues A. and B. *as such executors*, for the amount due to him, in respect of principal and interest, on the cheque. The result is judgment by default, and execution, under which 28*l.* 5*s.* is levied on the goods of C. The widow of C., shortly after his death, deposited with the banker, the title deeds of certain real estate of C., as security for the amount due on the cheque. A. and B. were both in distressed circumstances at this time, and possessed of no property whatever, and unable to pay what was due. Then a bill is filed in equity, by the banker, for an account of what was due, for principal and interest, against A. and B., praying that an account of the personal estate of C. might be taken, and if that should be found insufficient, &c., then that the real estate, or a competent part of it, should be sold, and the debt paid out of the proceeds. For the banker it was contended that the liability created by borrowing the 500*l.* was joint and several, and consequently that the defendants, as executors, were liable to pay the sum due; but the court held that the banker was not entitled to the relief claimed, and that such a cheque only showed a joint debt, and not a joint and several debt, if the case was put on the footing of the cheque itself, without reference to the consideration whether C. were a surety or not. The court also expressed a clear opinion that if an action had been brought in the lifetime of C., against him alone, or against either A. or B., it could not have been maintained, without breaking down the distinction between a joint debt and a joint and several debt.^(d) The *banker was obviously ill-advised; he takes a security which, as against the party to whom he gives credit, is practically unavailable; he ought to have taken a joint and several bond, or a joint and several promissory note,^(e) or C.'s guarantee, on either of which he might

(c) *Burton v. Payne*, 2 Car. & P. 520.

(d) *Other v. Iveson*, 24 L. J., Ch. 654, (*Kindersley, V. C.*;) S. C., 3 Drew. 177. The position in *Thorpe v. Jackson*, 2 Y. & C. 553, that a joint loan creates, in equity, a joint and several debt, was denied in *Jones v. Beach*, 2 De G. M. & G. 886, (Lords Justices, assisted by Maule, J.,) and also by *Kindersley, V. C.*, in the case stated above.

See *Pease v. Hirst*, 10 B. & C. 122; *Manley v. Boycott*, 22 L. J., Q. B. 265,

have recovered judgment, which (the proper steps having been taken,) would have bound the real property of C., and so the principal, interest and costs might have been realized.

It may be observed that when a joint and several instrument is taken, by bankers, as a security for a loan to a customer, who is one of the parties to the instrument, the other or others executing it as sureties, it may be well (and probably the practice is often so) that the bankers should expressly warn the latter parties, that they will be treated and considered, in all respects, as principals, in regard to liability on the instrument.(f) Such a course is desirable, because it would preclude any prospect, in case the bankers were driven to sue such surety on the instrument, of a successful defence being made, by him, on the ground that he delivered the instrument to them, as surety merely, and that they agreed to receive it, from him, as surety merely. Without such precaution there are circumstances in which such an answer to an action might, perhaps, be available;(f) if the precaution is taken no circumstances can be imagined, in which it is at all probable, that such defence could succeed.(f)

Reverting, then, to the subject of the right of the drawer to have sent back to him, by the bankers, all cheques drawn by him, on them, which they have paid, we come to inquire into the reason and object of the rule. Now the reason of the rule is immediately seen, when we come to [*78] consider that *the cheque, bearing the tokens of having been cashed, by the banker, affords evidence, when produced, of the money, for which it is drawn, having been paid, according to the requirement of the drawer, by the drawee; it is, therefore, the drawer's proof, or voucher, of the payment of the debt, due to the payee of the cheque. When the drawer draws, on his own account, against his own moneys deposited with the bankers, the cheque, in its cancelled state, is his evidence, against the payee, that the debt has been discharged. When the drawer draws on a fund, in the banker's, which he is specially empowered, in respect of some office, or situation which he holds, to draw upon, it is his voucher, as against his constituents, to whom the fund belongs, that their debt to the payee has been duly discharged. In either case equally, the cheque, or the piece of paper, is the property of the drawer. Thus in the latter case, if a person steals the cashed cheque he may be indicted for the larceny of the piece of paper, and it is proper and essential to lay the property in the drawer of the cheque, as shown on the face of the instrument itself; and this is so though the drawers of the cheque are the directors of an unincorporated company, and the money drawn against is the money of the body of shareholders of the company, and the person indicted is one of the shareholders and filled a situation under the company, which made him the servant of the directors.(g) There the defendant had, probably, forged the cheque,

which case shows that it is no defence, by a party to a joint and several promissory note, to show, that he signed merely as surety, and without consideration for making the note.

(f) See per curiam, 22 L. J., Q. B. 268.

(g) Reg. v. Watts, 2 Den. Cro. C. 14, 22.

and had appropriated the proceeds to his own use, and from that circumstance, and as the cheque had already been cashed when he stole it, the court held he could not be convicted, on a count charging the larceny of "an order for the payment of money," which is the proper mode of describing a cheque in indictments.

A creditor, it has been observed, may always object to a cheque when offered as payment; but the decisions have gone further than that, for if a creditor is offered in payment *of his debt, either cash or a [*79] cheque upon a banker, from the agent of the debtor, who offers the payment, and the creditor prefers the cheque and it is dishonoured, this, of itself, does not discharge the debtor, although the agent fails with a balance of the principal's, in his hands, to a larger amount.^(h)

Where, however, a creditor takes a cheque drawn by an agent of the debtor, on *his* (the agent's) own bankers, in payment of a debt, due to the creditor, from the debtor, (that he does so being unknown to the debtor,) and also gives a receipt to the agent, as for the money due from the principal, in consequence of which the principal deals differently with the agent, on the faith of such receipt, the principal is discharged, although the cheque is afterwards dishonoured, the agent becoming insolvent. It is otherwise, however, if the principal do not show that he was injured, by means of such false voucher and the omission of the creditor to inform him of the truth in due time.⁽ⁱ⁾

In this case we may perceive the presence of the principle, that where there is a loss and the question arises on which of two innocent parties is it to fall, the answer is, on that one of the two whose conduct has contributed to bring about the loss: but, in order to make the principle applicable, obviously it must first be shown, that a loss has actually occurred, and this would not be shown, in the above case, unless the principal proved that, on the agent's passing his accounts, he had had credit given him, as for the payment of this debt, on the ground of the receipt proving that it was discharged. If it were shown, however, it would manifestly be unjust that the principal should be obliged to pay the money over again.

Cheques as Evidence.—Where the plaintiff was tenant, and the defendant land steward, of a proprietor of land, and *the defendant [*80] had received, from a railway company, a sum of money, to be handed over to the plaintiff, as compensation for injury done to his temporary interest, as tenant, by the company's works, and the defendant had drawn a cheque, for 15*l.*, upon his bankers, in favour of the plaintiff, which the plaintiff had presented to the bankers, and got the cash for, from them; but there was no evidence that the cheque had been delivered, by the defendant, to the plaintiff: held, notwithstanding this, that the cheque, upon being produced by the defendant, in a cancelled state, was evidence of the payment to the plaintiff of the 15*l.*^(k) Here, it will be observed, there was independent evidence to establish the fact of money being due, from the defendant, to the plaintiff: without a con-

(h) *Everett v. Collins*, 2 Campb. 515.

(i) *Wyatt v. Marquis of Hertford*, 3 East, 147.

(k) *Mountford v. Harper*, 16 M. & W. 825.

sideration for delivering the cheque, and the circumstances under which it is delivered, are shown, the proof of the delivery and payment of a cheque, to a party, is not sufficient to prove a *debt*; (l) so that to produce a cheque, drawn by the defendant, is not an admissible mode of enforcing against him an alleged *debt*, due to the plaintiff. But the production of a cancelled cheque, after it has been shown *aliunde*, that there was due from the drawer a debt to the plaintiff, before the date of the delivery to him of the cheque drawn in his favour, is always evidence of payment, without explicitly tracing the cheque from the drawer to the payee.

Another instance of the value of cancelled cheques, as evidence, is the following:—On a certain day A. had a claim, to a certain amount, on B., C. and D., partners. Many months afterwards, B. signs a cheque for a larger sum, in the name of himself and C. and D., which was proved to have passed through A.'s hands, and to have been appropriated by him. In an action by A.'s executors, against the partners, for the original [* 81] claim, it was held that the cheque *was *prima facie* evidence of payment; but there being other circumstances, from which a loan for its amount might be inferred, it was left to the jury, whether the cheque represented a loan from B. alone, or from the partnership. (m)

It may be convenient to add here some further instances in which cheques are available in evidence.

Many bankers are in the habit of supplying their customers with printed forms, in blank, of cheques, which is convenient for the customers, as saving time and trouble, and is also useful for both parties, as increasing the difficulty of forging or altering cheques. It is also not unusual, upon a change in the firm of a banking house, which adopts this practice, to alter the printed form of the cheque accordingly, and to supply to their customers the altered form, in order that it may be used by them, for the future, instead of the old one. Such alteration in the name and style of the firm, when made in the printed form supplied, has been held, at *Nisi Prius*, to constitute a sufficient notification of the change, to a customer to whom the altered form has been delivered, and who has used it in drawing cheques. (n)

The Bank of England require their customers to use the engraved forms of cheques, which they supply, otherwise they refuse the cheque. (o)

A cheque has been shown, upon the authority of various decisions, to be admissible, when cancelled, as *evidence of payment*, the existence of the debt, and other circumstances relating to the giving of the cheque, being previously shown; but it is not, therefore, to be concluded that the drawing of a cheque in favour of a creditor by the debtor, and the delivery of it to the former, operate *per se* as payment, for a cheque is not money, (p) nor is it a legal tender; the creditor may always object to it

(l) *Aubert v. Walsh*, 4 Taunt. 293; *Lloyd v. Sandilands*, Gow. R. 15, as corrected, per Alderson, B., 16 M. & W. 827.

(m) *Boswell v. Smith*, 6 Car. & P. 60.

(n) *Barfoot v. Goodall*, 3 Campb. 147.

(p) *Moore v. Barthrup*, 1 B. & C. 5.

(o) See 6 Car. & P. 730.

as payment, and if he has *done so, when it was delivered to him, he may sue for the original debt, although he retains the [*82] cheque.(g)

It has, on various occasions, been made a question, at what period an attorney's bill of costs and charges was paid, in consequence of the enactment 6 & 7 Vict. c. 73, s. 21, restricting applications to tax such bills, to be made within twelve months after payment; and where bills of exchange or promissory notes having some time to run have been given in payment, the twelve months have been held to commence from the time when the bills or notes were honoured, not from the time they were given, unless they were treated, by the parties, as payment when given:(r) and the same would, in all probability, be held in case of a cheque, if ever the delay of the payee to present it for payment should have made the interval, between the delivery of the cheque to him and the cashing it, wide enough to make it worth while to raise the question. But, as every consideration that can be imagined would, in such case, operate to accelerate the presentment of the cheque, it is very unlikely that in practice the case should arise.

With respect to the Statute of Limitations, it has been held, that when a bill of exchange or promissory note has been given, in part payment of a debt, in such circumstances as to raise the implication of a promise to pay the balance, the defence of the Statute of Limitations is answered, as from the time of such delivery of the negotiable security, whatever afterwards becomes of it.(s) The question in the case deciding the above was, whether a bill of exchange, drawn by the plaintiff, and accepted by the defendant in part payment of an antecedent debt, was sufficient to take the case out of the statute, and the court determined that it was, and upon principles and reasoning which seem to apply equally, to part *payment, by a cheque, although a cheque is not properly a negotiable security,(t) but is always understood to be an order for [*83] speedy, if not an immediate, payment of money.(u)

Where, however, a purchaser, at a sale, gives a cheque for the amount of the deposit required by the conditions of sale, he may resist an action, on the cheque, on any grounds which would have enabled him to recover, at law, the deposit, if made in money.(v)

Again, to establish a petitioning creditor's debt, it is not enough to show that a cheque was drawn by him, in favour of the trader, before the bankruptcy; it must be proved that the amount of the cheque was paid by the petitioning creditor's bankers.(x) It seems, upon principles recognized in the courts of equity, that the payee, or bearer, of a cheque is the equitable assignee of a chose in action; that is, of the debt due, by the banker, to the drawer, and therefore that he might prove against

(g) *Hough v. May*, 4 A. & E. 954.

(r) *Sayer v. Wagstaff*, 5 Beav. 415; *In re Harries*, 13 M. & W. 3; see *In re Peach*, 2 D. & L. 36.

(s) *Turney v. Dodwell*, 23 L. J., Q. B. 137.

(t) See 13 M. & W. 64.

(u) *Smith v. Ferrand*, 7 B. & C. 19.

(v) Per Parke, B., in *Mills v. Oddy*, 6 Car. & P. 735; see *Spiller v. Westlake*, 2 B. & Ad. 155.

(x) *Bleasby v. Crossley*, 3 Bing. 430.

the creditor in respect of the cheque, if unpaid on presentation, the banker having funds.(y) And as the mere drawing of a cheque, on his bankers, by A. in favour of B., is not per se evidence of a loan of so much from A. to B., neither is a cheque drawn by B. on his bankers in favour of A., without proof that it was presented and paid, evidence of debt, for money lent by A. to B.(z)

Also, as we have seen, the ordinary relation of customer and banker, is that of creditor and debtor respectively, consequently, where a banker is the petitioning creditor, the production of cancelled cheques, drawn [*84] on him by the trader, *before the bankruptcy, is *prima facie* evidence of a payment of a debt, due from the banker, to the customer, not of a loan made by the banker to him, nor can such effect of this evidence be countervailed, and the existence of a loan established, so as to constitute a petitioning creditor's debt, without the clearest proof that the trader's account, with the bank, was overdrawn at the time the cheques were honoured.(a) It does not appear to have been contended in this case, that the circumstance of the banker having retained, in his own hands, these cashed cheques, contrary to the practice in the case of cheques drawn in ordinary circumstances, and the trader's submitting to the bankers doing so, in contravention of what would have been his right, if the cheques had been drawn in the ordinary course, was evidence to show a loan from the banker. The banker, in that case, would have a right to retain the cheques, because to part with them would be, to put beyond his control, the only conclusive evidence he might have of the loan, beyond the entries, in his own books corresponding with the cheques, which would be perhaps open to the objection, that to let them in would be, to allow the making of evidence in a man's own favour.

In all cases of loans to customers, some security, independent of cheques of the character of those just mentioned, ought, if possible, to be taken by the banker.

Bankruptcy.—Again, with respect to the operation of a cheque as constituting an act of bankruptcy, where a firm, having formed the resolution to stop payments, on the same day draws cheques on their bankers, in favour of certain creditors, (one of whom was their solicitor, who had not sent in his bill,) without any pressure, and giving these creditors time to carry their cheques to the bank, and get cash for them, in about [*85] half an hour after drawing and delivering *the cheques, sends word to the bankers, to pay no more cheques, &c. on account of the firm; it was held, in equity, that this was the transfer of a debt, due from the bankers, to the firm; that is, that it was a transfer of money, and so was within 6 Geo. IV. c. 16, s. 3, which makes any fraudulent transfer, or delivery, of any of the trader's goods and chattels, with in-

(y) See *Rodick v. Gandell*, 12 Beav. 325; 1 De G., M. & G. 763. See *Byles on Bills*, 17, and note (g). To give an action at law the debtor must consent to the assignment. *Tibbets v. George*, 5 A. & E. 115; *Warwick v. Rogers*, 5 M. & Gra. 348.

(z) *Pearce v. Davis*, 1 M. & Rob. 365.

(a) *Fletcher v. Manning*, 12 M. & W. 579, where the cheques were retained by the banker, as in *Other v. Iveson*, *supra*, p. 76, as the banker's evidences of a loan.

tent to defeat or delay creditors, an act of bankruptcy; for that money might well be considered to come within the meaning of "goods" in that section; (b) and such a transaction would probably be considered, at the present day, to be a fraudulent preference, under the circumstances, and not to be protected by the 133rd section of the Bankrupt Act of 1849, but to fall within the proviso of that section, and to be invalid as "a payment."

Insolvency.—The like would also, it seems probable, be held to be the operation of a cheque, under the Insolvent Debtors' Act, 1 & 2 Vict. c. 110, s. 59, namely, that it was a transfer of money or property within the terms of that enactment, if the party were found to be in insolvent circumstances, &c. at the time of drawing and delivering the cheque. (c)

The following transaction was held, in the circumstances, not to amount to a fraudulent preference.

A. & Co. are bankers, in an embarrassed condition, and about to stop payment. B., who is father-in-law of A., has a private account with the bank; he is also one of the managing directors of an assurance company, who also bank with A. & Co.

A. mentions the embarrassed state of the bank to B.'s son, telling him the bank would shortly stop payment; and it *was then [*86] agreed, between them, that B.'s private balance, amounting to about 2,000*l.* should be drawn out; but A. desired that B. would not give any information, of the matter, to a certain shareholder of the company, as he, A., did not wish the directors to know anything about it. In consequence of this information, B.'s private account was drawn out the following day, which was Monday. In the evening of that day A. saw B., and informed him of the state of the house, and that they could not go on beyond Wednesday then next. B. in consequence filled up a cheque, for the amount of the company's account, (about 8,000*l.*) and sent his son, with it, to another of the directors, by whom it was signed, and on the following morning presented and cashed. On the Wednesday A. & Co. stopped payment, and became bankrupts. In an action, by their assignees, against the secretary of the assurance company, to recover the above sum, as paid by way of fraudulent preference, the jury on the above facts, found that it never was the intention of the bankrupts, (none of whom, but A., knew of the communication,) that B. should draw out the company's balance, but only his own; and found a verdict for the defendant; and the court held there was no fraudulent preference, and nothing more than an ordinary payment on a cheque. (d)

In this case the fraudulent preference seems, in truth, to have consisted in the communication to B.; and if the assignees had sued B.,

(b) Ex parte Simpson, De G., Bank Rep. 9, per Knight Bruce, V. C., differing from a dictum of Tindal, C. J., in the previous case of Bevan v. Nunn, 9 Bing. 112, to the effect that payment of a debt, to a creditor, by way of preference, is not an act of bankruptcy under 6 Geo. IV. c. 16, s. 3. This opinion, it appears, that the chief justice still retained, at the time of the decision of Ex parte Simpson. See De G., Bank Rep. 27; and see Anon., 2 Show. 133.

(c) See Ogden v. Stone, 11 M. & M. 494.

(d) Belcher v. Jones, 2 M. & W. 258.

they would probably have recovered the 2,000*l.*, which he drew out in consequence of such information; but the court considered it to be carrying the doctrine of fraudulent preference too far, to lay down that, notwithstanding a man's declared intention contradicting any design of fraudulent preference, if, in consequence of any act of his, any other person obtains a preference, *that* will render the transaction fraudulent:

[*87] they considered that *no previous decisions warranted them in so deciding. Perhaps, however, it is to be regretted that a new trial was not granted in that case, so that it might have been seen whether a second jury would have been convinced, that a banker who communicates to the son of a director of a company, that the bank is about to stop, and then tells the father the same, really intends the matter to remain a secret from the directors, although he may declare he does. The case appears to open the way to indirect modes of effecting fraudulent preferences, by seeming to pronounce that nothing but a direct transaction between the bankrupt and the creditor preferred, can form such a preference.

It is well known that the legal aspect of a preference is not altered, by the fact, that the creditor preferred may have the strongest claims upon the gratitude of the firm. Thus, where a person on the 6th July, to whom a bank already owed 1,300*l.*, paid in a sum of 7,000*l.* to his account, which he had borrowed in order to help them, telling them he should not draw the money out until the Friday following; then, at five o'clock on the morning of the 9th, one of the firm encloses two promissory notes, his own separate property, to the amount of 17,202*l.* 18*s.* 4*d.*, to the creditor, and absconds to France, before the letter reaches its destination, and is made bankrupt; the assignees were held entitled to recover the notes in trover, the transaction being a manifest fraudulent preference,^(c) and a void transaction for want of the creditor's assent, and because an act of bankruptcy intervened before the notes reached him. The absconding partner owed more, to the firm, than the amount of the two notes.

Another class of cases, very materially affecting the interests of bankers, with reference to the proof of debts under bankruptcy proceedings, arises on the question, of the banker's knowledge, of an act of bankruptcy, previously committed, to his cashing a cheque of the bankrupt.

[*88] *A bankrupt, after an act of bankruptcy, of which the bankers have notice, though *that* is not the act of bankruptcy on which the fiat was founded, draws, upon them, various cheques, in favour of several creditors, which cheques are cashed by the bankers; they cannot prove for the amounts of them.^(f)

The expression "notice of an act of bankruptcy," it must be observed, has been construed to mean a general notice of an accomplished act of

(c) Harman v. Fisher, Cowp. 117.

(f) Ex parte Sharp, 3 M. D. & D. 490; see 12 & 13 Vict. c. 106, s. 165; Bamford v. Burrell, 2 B. & P. 1. Ex parte Sharp shows the law, in this respect, to be different from what had been formerly decided on similar facts. Ex parte Bowness, 2 M. & Sel. 479; S. C., 2 Rose, 266; Ex parte Birkett, per Ld. Eldon, C., 2 Rose. 73. As to evidence, see 12 M. & W. 571.

bankruptcy;(g) but the act must be complete; notice that something is going on, out of which perhaps an act of bankruptcy may result, is not sufficient;(h) and notice of an act of bankruptcy given to the Bank of England, in London, is notice to their branch banks, at all events, from the time, when information of it might be transmitted to the branches.(i) The time, here mentioned, probably means, time in the ordinary course of post; at least, before the invention of electric telegraphs, it has been held, that in cases of notice of dishonour, and similar cases, it was enough to transmit the information in course of post; and at present it remains undecided, the question never having arisen before the courts, whether the bank would be bound to send word by telegraph.

The case, first mentioned, of a trader drawing cheques on his bankers, after an act of bankruptcy, was, where his account was overdrawn, at the time; and it has been, before mentioned, that if bankers, knowing of an act of bankruptcy of a customer having funds in their hands, honour his cheques, they are liable to the assignees of the customer, on his becoming bankrupt, for the amount they have paid out *to [*89] such orders;(k) it was even held formerly, though such would not probably be now held, that bankers paying a customer's cheques, after an act of bankruptcy on his part, not known to them, would be liable, to the assignees, for the amount.(l)

Bankers stopping Payment.—As to the operation of a cheque drawn after stoppage of payment by bankers, where A. and B., partners, had a joint account with bankers; A. had also a separate account. On 22nd April the bankers announce a suspension of payment, and that they could not answer any more cheques. At that time A. and B. were indebted, on the joint account, 333*l.* to the bank, but the bank was indebted to A., on his separate account, 478*l.* After this no cash payments were made by the bank. On 25th May, A. assigns the balance of 478*l.*, due to him, to the joint account of A. and B., and gives a written notice to the bankers of such assignment, and A. and B. jointly require the bankers to place such balance to their joint account. This was not complied with. On the 30th May an act of bankruptcy was committed by the bankers, on which the fiat issued on the 31st. A court of chancery considered A. and B. to have no right to set off the two debts, their conduct showing, that though they knew they could not obtain payment of a cheque, they had attempted to have the full benefit of a cheque.(m)

Perhaps, however, the transfer of a cheque drawn, not by but in favour of, the trader, into the possession of a creditor, might come under a different construction, for a cheque, as we have seen before,(n) is a *chose in action*; and it has been held, on the highest authority, that the words "goods and chattels" will not pass a *chose in action*, when used

(g) Udall v. Walton, 14 M. & W. 254.

(h) Conway v. Nall, 1 C. B. 643; explained 14 M. & W. 258, 259.

(i) Willis v. Bank of England, 4 A. & E. 21.

(k) See Supra, pp. 66, 67. Vernon v. Hankey, 2 T. R. 113.

(l) Hammersley v. Purling, 3 Ves. 757.

(m) Watts v. Christie, 11 Beav. 546.

(n) Moore v. Barthrup, 2 Dowl. & R. 25.

[*90] in *a will; and as a will is to have a liberal construction, to carry into effect the intention of the testator, and the bankrupt acts are penal in their operation, and therefore to be construed strictly, it seems, *à fortiori*, that those words, when found there, cannot be taken to extend to cheques of this kind.^(o)

So, it has been solemnly decided that, stock and money in the funds do not pass under the words *bona et catalla felonum*,^(p) nor has the grantee the debts due to the felons,^(q) and consequently not cheques, which are orders for the payment of debts; but the grantee, under such a grant, has been held to take the ready money of the felon.^(r)

Cheques as Money.—By the usage of trade cheques have been, in some cases, considered as money. For instance, by the usage of banking, if a bill was sent up, to a London banker, from a country correspondent, to be presented for payment, the London banker was thought to be justified in receiving a cheque in payment for it, though the cheque be dishonoured, after he has given up the bill;^(s) but it may be doubted whether this usage would be considered, at the present day, to be a reasonable usage, so as to protect the London banker.

Another case in which a cheque has been regarded as payment is the following. A cheque given for stock sold is lost by the vendor in going home; the purchaser is immediately apprised of this, but refuses to pay the price of the stock without an indemnity. Four months after this the [*91] bankers on whom the cheque was drawn fail, with sufficient *money of the drawer's in their hands to cover it. Held that, under these circumstances, an action would not lie by the vendor for the price.^(t)

If a cheque has been given as the consideration of an annuity, it might, formerly, be stated as money, provided the cash for it had been received, by the grantor, previous to the execution of the deed;^(u) but, if not cashed previously, the cheque must have been set forth.^(x)

Cheques belonging to a person, against whose effects any writ of fieri facias may have been sued out of any superior or inferior court, may now and must be seized by the sheriff, by virtue of 1 & 2 Vict. c. 110, s. 12, but the statute makes a distinction between cheques, and money or bank notes, (both of which it empowers and orders the sheriff to seize,) in this way; it directs that money and bank notes shall be given up to the judgment creditor, but the sheriff is to hold cheques, &c., as a security, for the sum directed by the writ to be levied, and is enabled to sue upon them, and the payment by the party liable on such cheque, with or

(o) *Chapman v. Hart*, 1 Ves. sen. 271; *Moore v. Moore*, 1 Bro. C. C. 127; see *Ford v. Sheldon*, 12 Rep. 1.

(p) *R. v. Capper*, 5 Price, 265. *Wildman v. Wildman*, 9 Ves. 117.

(q) *R. v. Sutton*, 1 Saund. R. 275; see Com. Dig. Waife, C.; Vin. Abr. Prerog. of the King, E. c. pl. 1.

(r) *Anon.*, 2 Show. 133; 1 Wms. Saund. 275, n. (5); 13 Vin. Abr. 450; *Anon.*, Savil. 40; 2 Hawk. P. C. 450.

(s) *Russell v. Hankey*, 6 T. R. 12; *Ridley v. Blackett, Peake*, Add. Cas. 62.

(t) *Bevan v. Hill*, 2 Campb. 381.

(u) *Ex parte Michell*, 2 East, 137.

(x) *Abbot v. Douglas*, 1 C. B. 483; see *Sowerby v. Harris*, 4 T. R. 494, and now 17 & 18 Vict. c. 90, sched.

without suit, or the recovery and levying execution against the party so liable, is to discharge such party from his liability on the cheque, and then the sheriff is to pay over the money, so recovered, to the judgment creditor, &c., provided that no sheriff shall be bound to sue upon such cheque, unless the judgment creditor shall enter into an indemnity bond with two sureties, &c. This enactment has been amended, and the powers given by it somewhat enlarged, by 3 & 4 Vict. c. 82, s. 1.

The following decisions, under the combined operation of these statutes may be usefully brought to the reader's attention.

A judgment creditor, finding that a sum of money was about to be paid out, in a cause in Chancery, to his debtor, *applied to the court to order that the sheriff might be at liberty to seize, in the [*92] hands of the accountant-general in Chancery, a cheque by means of which the sum was to be paid out; it was held that the cheque was liable, by virtue of the above statute, to seizure; it was also held that, inasmuch as the cheque was in the hands of the accountant-general of the court, the application was proper;(y) that is, that it would not have been proper, for the sheriff, to seize, without being authorized by an order of the court.

In another case, subsequent to this, it was said that a cheque of the accountant-general in favour of A., but not delivered out, is not A.'s property, so as to be liable to seizure; and leave to seize was refused, the case being, it was said, distinguishable from the last-mentioned case, by the circumstance that the cheque had been delivered out, by the accountant-general, in the former case, which was not so in the latter; a stop order was accordingly granted, restraining the accountant-general, from parting with the cheque, out of his possession.(z) It may be observed, with respect to the distinction taken between the two cases, that, in the first case, the cheque had been delivered out, but had been replaced in the accountant-general's hands, so that, the property in it having passed to the creditor, the accountant-general held it as agent for the creditor, and the possession of the agent being the possession of the principal, it might be seized, in the hands of the one, on the same grounds, that it might be seized, in the hands of the other.

A cheque may have been treated, throughout a transaction as money, by all the parties, in which case none of them can turn round and insist upon any right that he might have derived, out of the cheque, considered as an order for the payment of money. Thus, if, in such circumstances, a cheque were deposited, with a person, to abide a certain event, [*93] it *would be no breach of the stakeholder's duty, to get the cheque cashed, before the occurrence of the event.(a)

Where there has been any fraud, on the party giving the cheque, then, although the creditor, at the time, took the cheque as payment, it will not be considered as money; thus, if A. gives B., in payment for goods,

(y) *Watts v. Jefferies*, 3 Mac. & G. 422.

(z) *Courtoy v. Vincent*, 15 Beav. 486.

(a) *Wilkinson v. Godefroy*, 9 A. & E. 536. Semble, keeping the cheque until a reasonable time for presenting and getting cash for it has elapsed, is evidence that the holder so treats it. *Bishop v. Chitty*, Stra. 1195.

a cheque which A. has no reasonable ground to expect will be paid, no property in the goods passes to A.(b), and B. may sue in trover, or he may affirm the contract, and sue for the price of the goods.(b)

A cheque drawn by A., in favour of B. as a gift, cannot, according to the general principle that there must be a consideration for an undertaking not under seal, be enforced by B. in an action against A. Nor can a cheque be the subject of a *donatio mortis causâ*, at least unless the payee get it cashed, before the drawer's death, or after his death, but before the banker has notice of the death.(c) Negotiable instruments, which are commonly treated as money, may constitute, as money may, a good *donatio mortis causâ*, but cheques, not being so treated, cannot be so considered in this respect; moreover, a cheque being a mere *chose in action*, cannot be a *donatio mortis causâ* for that reason.(d) It is to be observed also, as essential to the validity of a *donatio mortis causâ*, that the money, or the subject of the gift shall be actually handed over, at the time, at which the alleged donation is stated to have been made; (e) but a cheque is not money, nor is the piece of paper the subject of [* 94] the gift, so that, in either view, a cheque fails to conform to this requirement of a good *donatio mortis causâ*.(f)

When a cheque is handed to a person, on a condition, and the money is got by him, for the cheque, but the condition is not performed, the money may be recovered back by the drawer.(g)

A banker has no right to debit the customer, who draws the cheque, from the date at which it is drawn; he is bound to make the entry, as of the date, when the cheque was cashed.(h)

When a cheque is dishonoured and the payee sues the drawer upon it, and recovers, the cheque may be, it appears, referred to the master to compute principal and interest due,(i) as may be done in case of a bill of exchange or note; but, as in the case of such instruments, probably it would be indispensable, for that purpose, that the cheque should be produced at the trial.(k)

Cheques are not Bills.—Cheques, it has been said, are nearly on the same footing as bills of exchange, but there is much vagueness in this statement; and the points of difference seem to be more numerous than the points of resemblance. Cheques are not accepted; they pass by delivery without indorsement; they are not within the custom of merchants with respect to bills of exchange; they are not governed by the custom of merchants or the law merchant, as adopted into the law of England,

(b) *Hawse v. Crowe*, Ry. & M. 414; *Noble v. Adams*, 7 Taunt. 59; *Earl of Bristol v. Wilsmore*, 1 B. & C. 514.

(c) *Tate v. Hilbert*, 2 Ves. J. 111; *Reddell v. Dobsee*, 3 Jur. 722; 10 Sim. 244, S. C.

(d) *Miller v. Miller*, 3 P. Wms. 356; see *Lawson v. Lawson*, 1 P. Wms. 441.

(e) *Thompson v. Hefferman*, 4 Drn. & War. 285; *Lunn v. Thornton*, 1 C. B. 381, n.

(f) See further, *Hughes v. Stubbs*, 1 Hare, 476.

(g) *Wienholt v. Spitta*, 3 Campb. 376; see *Spencer v. Spicer*, 2 M. & Gra. 295.

(h) *Goodbody v. Foster*, per Ld. Lyndhurst, C. B., Cambr. Sum. Ass. 1831, cited Byles on Bills, 18, (6th ed.)

(i) *Bentham v. Ld. Chesterfield*, 5 Scott, 417.

(k) *Hutton v. Ward*, 15 Q. B. 26.

but by the common and statute law of the land. The courts, on various occasions, have pointed out differences and discrepancies between the rules and principles applicable to cheques, and those applicable [*95] *to bills of exchange. Thus, it has been observed, that no days of grace are allowed with respect to cheques, which are always to be cashed speedily, if not immediately; (l) also, as has been stated already, the owner of a cheque does not obtain, on a cheque, any more time, for presentment by employing a banker to make it, while in the case of a bill of exchange, by the custom of merchants, the holder obtains a day more, for giving notice of dishonour, by presenting it through a banker, than if he presented the bill himself; (m) also, the death of the drawer of a cheque rescinds the banker's authority to pay it; the death of the drawer of a bill of exchange has no operation, to diminish or alter, the nature of the responsibilities of the other parties to it. (n)

Again, where the indorsee of a bill of exchange sues the acceptor of a bill, accepted payable at a banker's, it is not necessary, to enable him to recover, that he should prove that the acceptor has had notice of the non-payment at the banker's; but in the case of a cheque, if the payee sues the drawer, it is necessary to give notice to the drawer, of the non-payment, at the banker's. (o) An instrument, calling on A. to pay so many pounds, on account of B., to C., and accepted by A. and indorsed to D., payable at E.'s bank, differs from a cheque, and cannot be sued on as such; it is a bill of exchange (p) We have seen, when discussing the subject of the London Clearing House used by bankers, how cheques, presented at the banking house, too late for payment *to-day, [*96] are marked for payment at the Clearing House, to-morrow, such marking having the effect of an acceptance by the usage; but no usage can countervail the effect of an Act of Parliament; and by statute, acceptance of all inland bills of exchange must be in writing. Now a mere mark, unaccompanied by any words signifying recognition or acceptance of the order, could not be looked on as a compliance with the enactment; and in this respect, therefore, cheques differ from bills. The Statutes of Limitations run against the contractor's liability, in all cases (q) of bills of exchange, from maturity; it does not appear to be considered that the drawer of a cheque would be justified, by the mere circumstance of the payee's refraining from presenting it, for any number of years, in ordering his banker to refuse payment when it should be presented. (r)

(l) *Smith v. Ferrand*, 7 B. & C. 19; see *Grant v. Vaughan*, 3 Burr. 1517. As to days of grace, *Moyser v. Whitall*, 9 B. & C. 409; *Sutton v. Toomer*, 7 B. & C. 416. It was not until upwards of eighty years had elapsed after the date of 3 & 4 Anne, c. 9, putting promissory notes on the same footing as bills of exchange, that the courts, after some oscillation, finally decided days of grace to be allowable, on promissory notes, as well as on bills of exchange. *Brown v. Harraden*, 4 T. R. 148, A. D. 1791. (m) *Alexander v. Burchfield*, 7 M. & Gra. 1060.

(n) *Billing v. Devaux*, 3 M. & Gra. 571, 572, 573.

(o) *Treacher v. Hinton*, 4 B. & Ad. 413; see *Walwyn v. St. Quintin*, 1 B. & P. 652.

(p) *Treacher v. Hinton*, 4 B. & Ad. 413.

(q) See several points of difference pointed out by *Tindal, C. J.*, and *Maule, J.*, *Warwick v. Rogers*, 5 M. & Gra. 363.

(r) See dict. per *Patteson, J.*, *Robinson v. Hawkesworth*, 9 Q. B. 56.

A bill of exchange (being an inland bill,) payable on demand, must have its appropriate stamp to be valid; a cheque (the requirements of the statutes being observed) is exempt.(s)

At law, there are many cases which establish, that no action for money had and received will lie, against a banker, in respect of funds, which his employer has ordered him to pay, to any person, at the suit of the person, in whose favour the order is made, unless the banker has assented to the order and communicated his consent to the plaintiff;(t) in equity, however, an order upon a person owing money, or holding funds belonging, to the drawer, operates as an equitable assignment of such debt or money;(u) and the assignee might, it seems, in equity, proceed against [*97] the banker. The law merchant does this with respect to bills of exchange.

A cheque is not due before payment is demanded, and in this respect differs from all such bills of exchange as are payable on a fixed day.(x)

In one respect, there appears to be no difference between a bill of exchange and a cheque, as regards pleading: namely, that in an action by indorsee against drawer of the one, or by payee against drawer of the other, defendant may equally allege, as a ground why non-payment has not been notified, to the drawer, before action, that the plaintiff has sustained no damage by reason of such want of notice.(y)

Stamps on Cheques.—By 31 Geo. 3, c. 25, s. 19, no bill of exchange, promissory note, or other note, draft, or order, nor any receipt, discharge, acquittance, note, memorandum, or writing aforesaid, liable to the duties by this act imposed, or any of them, shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity, unless the vellum, parchment, or paper, on which such bill of exchange, promissory note, or other note, draft, or order, receipt, discharge, acquittance, note, memorandum, or writing, as aforesaid, shall be engrossed, printed, written, or made, shall be stamped or marked with a lawful stamp or mark, to denote the rate or duty as by this act is directed, or some higher rate or duty in this act contained; and it shall not be lawful for the said commissioners or their officers, to stamp or mark any vellum, parchment, or paper, with any stamp or mark directed to be used or provided by virtue of this act, at any time after any bill of exchange, promissory note, or other note, draft, or order, or [*98] any receipt, discharge, or acquittance, *except as herein is otherwise provided, shall be engrossed, written, or printed thereon, under any pretence whatever; anything in this act contained, or any law or statute to the contrary thereof notwithstanding.

This enactment does not appear to be interfered with, by the pro-

(s) See 55 Geo. III. c. 184, sched.; 17 & 18 Vict. c. 83, ss. 7, 8, 9, 10; see *infra*, p. 98.

(t) *Warwick v. Rogers*, 5 M. & Gra. 374; *Wharton v. Walker*, 4 B. & C. 163; see 9 A. & E. 396.

(u) *Rodick v. Gandell*, 1 De G. M. & G. 763.

(x) *Per* Ld. Kenyon, C. J., *Boehm v. Sterling*, 7 T. R. 430; *Alexander v. Burchfield*, *ubi supra*.

(y) *Thomas v. Fenton*, 5 Dowl. & L. 28; *Kemble v. Mills*, 1 M. & Gra. 757; *S. C.*, 9 Dowl. 446.

visions of the late statute 16 & 17 Vict. c. 59, repealing certain stamp duties, &c., and amending the laws relating to stamp duties.

The 55 Geo. III. c. 184, s. 8, refers to the former statute of Geo. III., and incorporates these provisions.^(z)

Hence it would almost appear, that, as the above enactment makes cheques unstamped to be invalid, the payee of a cheque, like the payee of a bill, which is unstamped, cannot recover upon it, and it seems also as though the case were not within the Common Law Procedure Act, 1854, which makes provision for the stamping at the trial of unstamped documents produced in evidence,^(a) because the stamp acts appear to make void all such cheques, &c., as have not the proper stamp affixed to them, before anything be written or printed, on the paper intended for the cheque. In other words, cheques, which, from the circumstances in which they are drawn,^(b) require stamps to give them validity, cannot be made available, in evidence, by complying with the requirements of the Common Law Procedure Act, 1854.

A late statute introduced some alterations, with respect to stamps on drafts or orders on bankers, in cases where they were already required to be stamped: for, retaining the exemption from stamp duty of all drafts or orders on bankers for the payment of money to the bearer on demand, it imposed a stamp duty of one penny on *all* drafts or orders payable to order on demand, and on letters of credit, permitting such duties to be denoted, either by stamp impressed *on the paper, [*99] or by an adhesive stamp, and directing the person signing, or making, the draft or order, to cancel or obliterate such adhesive stamp, by writing thereon his name or the initial letters of his name, under a penalty of 10*l.*^(c)

Another statute, reciting the law to be that "certain drafts or orders for the payment of any sum of money to the bearer on demand, drawn upon any banker or person acting as a banker, residing or transacting the business of a banker, within fifteen miles of the place, where such drafts or orders are issued, are exempted from all stamp duty," to prevent the negotiating or circulating these drafts, &c. beyond the fifteen miles, prohibits, under penalty of 50*l.*, such draft or order being sent to any place beyond that distance, "in a direct line from"^(d) the bank or place, at which the same is made payable: *or* being received, in payment, or as a security, *or* being otherwise negotiated or circulated, at any place, beyond the said distance.^(e) There is nothing, however, to prevent any one, who may receive such draft or order, at any place, within the fifteen miles, which has been lawfully issued without a stamp, from affixing an adhesive stamp and cancelling it, as before, so as to remit or send the draft or order beyond the distance, &c.; in which case it may

(z) Field v. Woods, 10 B. & C. 114; Smart v. Nokes, 7 Scott, N. R. 794.

(a) 17 & 18 Vict. c. 125, s. 28.

(b) See Bradley v. Bardsley, 14 M. & W. 876.

(c) 16 & 17 Vict. c. 59, ss. 3, 4, and sched.

(d) I. e., measured along a horizontal plane. Stokes v. Grissell, 23 L. J., C. B. 141; see Grant on Corporations, 388, 389, n. (f).

(e) 17 & 18 Vict. c. 83, ss. 7, 8.

be received and negotiated beyond the distance, notwithstanding the above enactments. (e)

As regards crimes and offences in relation to cheques, it is an offence under the statute 7 & 8 Geo. IV. c. 29, s. 53, [though perhaps not at common law, unless, at any rate, the defendant be charged with using false tokens, &c. in order to accomplish the deceit, (f)] for a person to give, what purports to be his cheque upon his banker, in payment for [*100] goods, when in truth he has no account with the banker *named; this is a false pretence under that statute. (g) So, where the prisoner was charged with falsely pretending that a post-dated cheque, drawn by himself, was a good and genuine order for 25*l.*, and of the value of 25*l.*, whereby he obtained a watch and chain, and the jury found that before the completion of the transaction—of the sale and delivery of the watch and chain, by the prosecutor, to the prisoner—he represented, to the prosecutor, that he had an account with the bankers on whom the cheque was drawn, and that he had a right to draw the cheque, though he postponed the date for his own convenience, all which was false, and that he represented that the cheque would be paid, on or after the day of the date, but he had in reality no funds to pay it, the prisoner was held to be properly convicted. (h)

A cheque was made payable to D. Francis Jones [not saying “to order,” nor adding the words “or to bearer”] by a person living in Wales, and enclosed in a letter directed to Kennington, Surrey.

A person was indicted under 7 & 8 Geo. IV. c. 29, s. 5, which makes it a felony “to steal (amongst other things) any order, or other security whatsoever, for money, or of payment of money,” for larceny of the above-mentioned instrument, which turned out to be on unstamped paper; it was contended, on his behalf, that this instrument, being payable to D. Francis Jones alone, was not of any value to the prisoner, or to any other person than D. Francis Jones, and was not an available security; the judges held that this cheque, having been drawn, at Brecon, upon Messrs. Childs’ bank in London, without a stamp, was not a valuable security, within the above enactment, because it would be a breach of the law for the bankers to pay it. (i)

On the indictment of a person, for uttering a forged cheque, it is not [*101] necessary to call the supposed maker to disprove an *authority from him to any other person to sign in his name; it is sufficient to disprove the handwriting. (k)

In general a cheque may be described as a valuable security of the value of, &c., without mentioning the name of the banker on whom it is drawn. (l)

The defendant, a stock broker, received from the prosecutor a cheque

(e) 17 & 18 Vict. c. 83, ss. 7, 8.

(f) R. v. Lara, 6 T. R. 565.

(g) R. v. Jackson, 3 Campb. 370.

(h) R. v. Parker, 2 Mood. C. C. 1. S. C., 2 Russ. Cri. & M. 298.

(i) R. v. Yates, 1 Mood. C. C. 170.

(k) Reg. v. Hurley, 2 M. & Rob. 473. What not larceny of a cheque, Reg. v. Johnston, 21 L. J. (N. S.) Mag. C. 32.

(l) Reg. v. Heath, 2 Mood. C. C. 33.

upon his banker, to purchase exchequer bills for him; the defendant cashed the cheque and absconded with the money. Upon an indictment for stealing the cheque and the proceeds of it, it was holden to be no larceny, although the jury found, that before he received the cheque, the defendant had formed the intention of converting the money to his own use; not of the cheque, because the defendant had used no fraud or contrivance to induce the prosecutor to give it to him; and because, being the prosecutor's own cheque, and of no value in his hands, it could not be called his goods and chattels; nor of the proceeds of the cheque, because the prosecutor never had possession of them, except by the hands of the defendant.^(m)

But where the prosecutors gave to the defendant, who was occasionally employed as their clerk, a cheque payable to a creditor, to be delivered by him to the creditor, and the defendant appropriated it to his own use, this was holden by the judges to be a larceny of the cheque.⁽ⁿ⁾

A person may be indicted for forging a cheque as "an order for the payment of money" under 11 Geo. IV. & 1 Will. IV. c. 66, s. 4. If the charge, in the indictment, be for forging a warrant or order, proof of a document which is a warrant but not an order for the payment of money, will not support the indictment, according to one ruling; but another case has been decided to the contrary.^(o)

*A cheque on a banker (although it be post dated,^(p)) is a warrant and order, for the payment of money, within the above-mentioned statute.^(q) [*102]

Where an instrument, is in any respect, incomplete, and therefore not operative, as where the practice was, for a majority of the officers of a parish, to draw cheques on the treasurer of a union; and one of their blank cheques, filled up for £1: 3s. 6d., had a note at the bottom,—“Unless this cheque is signed by a majority of the parish officers, it will not be cashed.” This cheque was signed, by one of the officers while it was for £1: 3s. 6d.; it was then altered to £3: 3s. 6d., and when cashed, by the treasurer, had the signatures of a majority of the officers to it: it was held, that if the cheque was fraudulently altered, when it had only one signature to it, this was no forgery.^(r)

A cheque on a banker, in a fictitious name, or in the name of a person who never kept cash, with the banker, is a warrant or order, within the meaning of the act, for it imports, upon the face of it, to be an order, by

(m) R. v. Walsh, R. & R. 215.

(n) 1 Mood. Crim. C. 433, R. v. Metcalfe; Reg. v. Heath, 2 id. 33.

(o) Compare Reg. v. Williams, 2 Car. & K. 51, with Reg. v. Williams, 2 Den. C. 61. Filling a form of cheque, already signed, with blanks left in it for the sum, &c., is forgery. Flower v. Shaw, 2 Car. & K. 703.

(p) Reg. v. Taylor, 1 Car. & K. 213

(q) R. v. Willoughby, 2 East, P. C. 944; R. v. Shepherd, id. What not proper averment and description of an order for the payment of money, R. v. Ravenscroft, R. & R. 161; Reg. v. Curry, 2 Mood. C. C. 218; see Reg. v. Turborville, 4 Cox, Crim. Cas. 13. A. draws a bill on B., on whom he has no right to draw, in order to induce bankers to honour his cheque, which they do: A. held not guilty of cheating them. R. v. Wavell, 1 Mood. C. C. 224.

(r) Reg. v. Turpin, 2 C. & K. 820.

a person having authority to make it.(s) So, a draft forged in the name of a person who *does* keep cash with the banker, is an order within the act, whatever be the state of his account at the time.(t)

Will.—A cheque may be admitted to probate, as a paper, of a testamentary character.(u)

[*103] *Cancellation of a *cheque* is imperative on the banker, upon payment thereof; and any banker, who shall refuse or neglect to cancel the same, is made liable to a penalty of 50*l.*(x)

Cancellation of the stamp, we have seen, is obligatory under a like penalty, upon the person issuing or negotiating a cheque, stamped with an adhesive stamp.(y)

[*104]

*CHAPTER III.

BILLS OF EXCHANGE PAYABLE AT BANKER'S.

WE will next pass to the consideration of the duties of bankers, and their liabilities and rights, as regards bills of exchange, made payable at their banking houses.

Formerly, it was for a long time, much disputed whether a bill of exchange drawn generally, but accepted payable at a particular place named on it, ought to be presented at that place, in order to show a cause of action by the holder against the acceptor. At length this doubt was set at rest by a decision of the House of Lords, which declared the law to be, that an acceptance, payable at a specified place, was a qualified acceptance, which imposed upon the plaintiff, in an action against the acceptor, the necessity of stating and proving presentment at that place, in order to recover on the bill.(a) The legislature, however, thought this part of the law required some alteration, and accordingly the statute 1 & 2 Geo. IV. c. 78, was passed, enacting, that an acceptance payable, on the face of it, at a particular place, shall be considered to be a general acceptance, unless it be expressed to be payable there *only, and not otherwise or elsewhere*. It is of little avail, therefore, that an acceptor, wishing to have his bill paid by his bankers, states on the bill that he accepts it, to be paid at his bankers, unless he adds the words

[*105] “and not otherwise,” or the word “only.”(b) The statute, *it

(s) *R. v. Lockett*, 1 Leach, 94; *R. v. Abraham*, 2 East, P. C. 941.

(t) *Reg. v. Carter*, 1 Den. C. C. 65; 1 C. & K. 741.

(u) *Wulsh v. Gladstone*, 1 Phill. Eq. R. 294; *Heming v. Clutterbuck*, 1 Bli. (N. S.) 479; *Brine v. Ferrier*, 7 Sim. 549; see *Gough v. Findon*, 7 Exch. 48; *Bartholomew v. Henley*, 3 Phillim. 317.

(x) 55 Geo. III. c. 184, s. 19; See *Morley v. Culverwell*, 7 M. & W. 174.

(y) See p. 99.

(a) *Rowe v. Young*, 2 Bro. & B. 165; S. C., 2 Bligh. 391.

(b) *Higgins v. Nicholls*, 7 Dowl. 551. A person, who takes a qualified acceptance, is bound to give notice to the drawer; for non constat that he will assent to the qualified acceptance. See 9 M. & W. 509. The holder of a bill may refuse to

is to be observed, only mentions acceptances; it has been decided that a drawer cannot render the bill payable only at a particular place, by stating it to be so, in the body of the instrument, so that a bill made by the drawer, payable at a particular place, is nevertheless accepted generally, unless the acceptor accepts it in the above terms, saying, that it shall be paid at that place only, and not otherwise or elsewhere.(c)

Since the statute there are three different modes (as to two of them, however, differing chiefly in form,) in which a bill may be accepted; 1, generally; 2, payable at a banker's named; 3, payable at a particular banker's only, or not otherwise or elsewhere.(d) Now, if the drawee accepts generally, there can be no doubt he undertakes generally to pay the bill, at maturity, when presented to himself; if he accepts in the second form, then the holder has the option either of presenting, to the acceptor himself, or at the banker's specified, and that within banking hours; for in that case the acceptor's undertaking is to pay the bill, at maturity, on its being presented in either way; if the acceptor adopts the third mode, then, of course, he excludes the holder, from any other mode of presentment, than to the banker named, and that within banking hours.(e) Hence, in suing an acceptor of a bill accepted, payable at a banker's, in the second mode, it is not necessary to allege or prove presentment there.(e) In suing the *drawer*, however, the case is different; for, in respect to such action, it seems still to be necessary, *if the bill be accepted*, and be accepted payable at a banker's named *by the acceptor, to allege and prove presentment there; (f) so if [*106] made payable in the body at a banker's, and accepted generally; (f) and if the bill be *drawn*, payable at a particular place, then to charge the *drawer*, it is necessary to show a presentment at that place; for such must have been the case before the statute, and the statute was not intended to alter, and has not altered, the liability of drawers of bills of exchange: it is confined in its operation to the case of acceptance alone.(g)

If a bill of exchange be accepted, payable at a banker's, three months after date, and, in the course of business, is indorsed to the bankers, they, on suing the indorser, have no need to show that they presented

take a special acceptance at a banker's. Per Lawrence, J., and see Le Blanc, J., *Parker v. Gordon*, 7 East, 385; see *Gammon v. Schmoll*, 5 Taunt. 353.

(c) *Selby v. Eden*, 3 Bing. 611; *Fayle v. Bird*, 6 B. & C. 531.

(d) It will suffice to accept payable at such a bank, "and not otherwise," without adding "only." *Higgins v. Nichols*, 7 Dowl. 551.

(e) *Halstead v. Skelton*, 5 Q. B. 92; S. C., 2 Dowl. (N. S.) 79; *Bailey v. Porter*, 14 M. & W. 44. There is no objection, in declaring against an acceptor, to a statement that the bill is accepted, payable at a particular banker's, though, in fact, the acceptance be in the second form. *Blake v. Beaumont*, 4 M. & Gra. 7; S. C., 1 Dowl. (N. S.) 697; see 21 Vin. Abr. 463, 464. But in such case, as the acceptor engages to have funds, at the bank, to meet the bill, if it is not paid he is not, in general, entitled to notice of dishonour. *Turner v. Haydon*, 4 B. & C. 1. That the presentment must be made within banking hours, see *Parker v. Gordon*, 7 East, 385; *Whitaker v. Bank of England*, 1 C. M. & R. 744; *Wilkins v. Jadis*, 2 B. & Ad. 188; may be made after, if the bank be not shut, or if any one be left to say if there are no orders. *Garnett v. Woodcock*, 6 M. & Selw. 44.

(f) *Gibb v. Mather*, 8 Bing. 214; S. C., 2 Cro. & J. 254.

(g) See *Boydell v. Harkness*, 3 C. B. 168; S. C., 4 Dowl. & L. 179.

to the acceptor; for, as the bankers, at whose house the bill was to be paid, were themselves the holders of it, it was a sufficient demand, for them to turn to their books, and ascertain the state of the acceptor's account, with them, and a sufficient refusal, to find that he had no effects in their hands; (h) and a letter written on the day, when the bill became due, to the defendant, on behalf of the bankers, stating the acceptor's bill to be unpaid, and requesting the defendant's immediate attention to it, is sufficient notice of dishonour. (h)

Precisely the same has been laid down, as the law with respect to a promissory note, stated by the maker, in a *memorandum*, to be payable at a banker's, to whom it became indorsed in the course of business, and who sued the indorser. (i)

[*107] The drawer of a bill of exchange, accepted generally, (*subsequently to the passing of the statute 1 & 2 Geo. IV. c. 78,) added the words "payable at R. & Co.'s bankers, London," without the knowledge of the acceptor, and then indorsed it for valuable consideration, the bill being overdue, and the indorsee privy to the alteration. The acceptor was held to be discharged; notwithstanding the argument which was pressed, that, since the statute, this was only a general acceptance, and that no demand was necessary against the acceptor, and that, consequently, in an action by the indorsee against the acceptor, it was not possible to contend that he was prejudiced. (k)

A bill is accepted payable at a bank, which is also that of the drawer; the drawer discounts it with them, and indorses to them; they rediscount, and, on maturity, pay it, without indicating to the holder whether they pay as indorsers, or as agents for the acceptor. The acceptor's account being overdrawn, the bank give notice of dishonour to the drawer, and he is debited with the amount. It was held, they had a right to pay the bill as indorsers, taking time to inquire, if they would honour the bill or not. (l)

Again, where a drawer, after getting a bill accepted, payable at a banker's, kept the bill by him for some years, during which period the bankers became bankrupt, and then having erased their names, and substituted the name of another banker, without the knowledge of the acceptor, indorsed the bill, it was decided that the acceptor was discharged, the alteration being considered to be material. (m)

The effect of returning a bill accepted, payable at the acceptor's bank, to the indorsee's bankers, at the Clearing House, with "orders not to pay," written on it, and "cancelled by mistake" also, is to disable the indorsee to recover, against the bankers, as for money had and received. (n)

(h) *Bailey v. Porter*, 14 M. & W. 44. As to the latter point, see *Allen v. Edmundson*, 2 Exch. 723; *Everard v. Watson*, 22 L. J., Q. B. 222.

(i) *Saunderson v. Judge*, 2 H. Bla. 569.

(k) *Mackintosh v. Haydon*, 2 Campb. 362; see *Burchfield v. Moore*, 23 L. J., Q. B. 261.

(l) *Pollard v. Ogden*, 2 E. & B. 459.

(m) *Tidmarsh v. Grover*, 1 M. & Selw. 735.

(n) *Warwick v. Rogers*, 5 M. & Gra. 340.

*If a bill be accepted, payable at a particular town, presentment, it is said, at all the banking houses in the town is sufficient.^(o) [*108]

If a bill be accepted, payable at a particular place, the acceptance, as before shown, is general; it is, therefore, needless to state any thing about the place in declaring against the drawer; such presentment, as the form of acceptance requires, being only matter of evidence; it is also, in some cases, objectionable, to state the special acceptance, for if the special acceptance be stated, then, on suing the drawer or indorser, it may become necessary to state such presentment as the acceptance requires, and the omission to do so might be taken advantage of; though it would not, perhaps, be available after verdict,^(p) in all cases.

If a bill is made, payable at a particular bank, by the acceptor, then, in an action by indorser against drawer, it is not necessary to allege a presentment to the acceptor at the bank; it has been decided to be enough to aver the presentment to have been made there.^(q)

It has been stated that the effect of acceptance at a named bank, is to give the holder the option of presenting, either at the bank, or to the acceptor himself;^(r) it is a further effect of such acceptance, (or, perhaps, is only another mode of stating the same thing,) that if the holder presents at the bank, and is refused payment, he may sue the other parties to the bill, without any other presentment.^(s) But the acceptor, having funds to meet the bill in the banker's hands, is, nevertheless, not apparently exonerated, if they fail, after *the maturity of the bill, but before it has been presented,^(t) although the holder is in [*109] default.

A person who accepts a bill, payable at his bankers', is held thereby to give authority to the bankers, to apply to the payment of it, any funds of his, in their hands, and there is no necessity for them, to have any other or more specific authorization, than the terms of the acceptance itself.^(u) But from what has already been laid down, to the effect that bankers are bound to know the handwriting of their customer, and what is not his handwritting, it is manifest they would not be exonerated if they paid the bill, and it turned out that the acceptance was forged.^(x)

(o) Hardy v. Woodroffe, 2 Stark. 319.

(p) Lyon v. Holt, 5 M. & W. 250; Parker v. Ade, 1 Dowl. 643; see Wilmot v. Williams, 7 M. & Gra. 1017; Boydell v. Harkness, 3 C. B. 168; S. C., 4 Dowl. & L. 179.

(q) Shelton v. Braithwaite, 8 M. & W. 252; see S. C., as to notice of dishonour.

(r) De Bergareche v. Pullin, 11 J. B. Moore, 350; Roach v. Johnston, 4 Jur. 956.

(s) Mackintosh v. Haydon, Ry. & M. 362; Hankey v. Berwick, 4 Bing. 135.

(t) Rhodes v. Gent, 5 B. & A. 246; Turner v. Haydon, 4 B. & C. 1, qu. tam.

(u) Kymer v. Laurie, 18 L. J., Q. B. 218. If the customer afterwards commits an act of bankruptcy, and then repays them the difference between the amount of the bill and his assets with them, such payment is not protected, Holroyd v. Whitehead, 5 Taunt. 440; S. C., 2 Rose, 145, and the bankers cannot sue on the bill, for it is functus officio, by the law merchant, when once paid by the acceptor, and also may not be reissued, by the express provision of 55 Geo. III. c. 184, s. 19, under a penalty of 50*l*.

(x) Smith v. Mercer, 6 Taunt. 76; S. C., 1 Marsh. 453.

Bill, to whom payable.—But to whom does the acceptor authorize and order his bankers to pay? Is it to the lawful holder, or to whom, that the law merchant justifies the banker in paying the amount? The answer is, the banker was justified in paying, not merely to a lawful holder, but to any one who can give him a lawful discharge, according to the law merchant. Therefore a banker paying a bill, accepted by a customer as above, but bearing an indorsement, purporting to be in the handwriting of the payee, but being, in fact, a forgery, and being accepted, after this and other indorsements, had been made on the bill, and presented at the clearing house by a banking firm, who were indorsees, was not, it has been held, justified, by reason of such forged [*110] indorsement, in paying to the holder, or indorsee, *who could not give a legal discharge, and consequently the banker could not debit the account of the acceptor, with the sum paid, but must himself bear the loss.(y) Now, however, the law appears to be altered by statute,(z) so that a banker is safe in paying a bill, which purports to be indorsed by the payee.

If, when a person accepts a bill, payable at a banker's, his account with them is in such a state, as not to be adequate to pay the whole amount, for which the bill is accepted, it appears doubtful whether the law enables the bankers, if they pay the whole amount, to recover from the customer the difference between the amount of his moneys in their hands, and the sum in the bill.(a) It clearly, however, does not affect the question, of the authority, that the customer did not intend the bill to be paid; the drawer having become bankrupt.(a) Nor is the relative position of the bankers, to the customer, affected by the circumstance, that after the payment they endeavoured to get back the money, treating it as a payment made by mistake, or that they had subsequently honoured a cheque, drawn by him upon them.(a)

A banker, receiving a sum for the express purpose of taking up a bill, made payable at his bank, without objection at the time, cannot apply it to discharge the amount, by which the customer paying in the money, has overdrawn his account, nor ought he to pay cheques, drawn subsequently to the bill, before he pays it.(b)

Bill when paid.—Next, when is a bill made payable at a banker's said to be paid? Now, in all cases of a contract to pay money, that can only properly be called payment, which is payment according to, and in [*111] the sense of, the *contract;(bb) so that payment, by a stranger, does not discharge the party contracting to pay, unless made, by the stranger, as his agent, and with his prior authority or subsequent ratification. Hence, payment, by a stranger, of the amount of a bill of exchange, to the bankers, at whose house it was made payable by the

(y) *Tucker v. Robarts*, 16 Q. B. 560, in error; see 16 & 17 Vict. c. 59, s. 19.

(z) 16 & 17 Vict. c. 59, s. 19.

(a) See note (u), ante, p. 109.

(b) *De Bernales v. Fuller*, 14 East, 590, n. So in case of army and navy agents. *Stevens v. Hill*, 5 Esp. 247.

(bb) *Simpson v. Egginton*, 24 L. J., Exch. 313; *Church v. Bishop*, 2 Ves. sen. 272; *Hopper's case*, 2 Leon. 110; *Smith v. Craven*, 1 Cro. & J. 500; see Cro. Eliz. 541.

acceptance, under an arrangement with them, whereby the person paying obtained possession of the bill, for a collateral purpose of his own, is not a payment of the bill by the acceptor.(c)

Caution as to paying.—The facts and the decision upon them, about to be stated, furnish proof, if any be required, of the extreme caution which bankers are bound, in order to protect themselves, to exercise, in the payment of bills accepted by customers, payable at their banking house.

A bill, purporting to be accepted by a customer, payable at his bankers', was presented to them and paid. The bankers, on the following day, discovered the acceptance to be a forgery, and demanded back the money, from the holder, to whom they had paid it; but it was laid down by the court, that the holder was entitled to know, on the day on which the bill became due, whether it was honoured or dishonoured, and that, no notice of the forgery having been given him, on the day the bill became due, the bank could not recover. Moreover, the court expressly abstained from pronouncing any opinion whether, if notice of the forgery had been given, to the party, to whom payment had been made, at a later period of the day, on which the payment was made, so as to enable him to send notice to the prior parties on that day, the bank would have been entitled to recover.(d)

*Where a bank only discounts, for a third party, a bill, purporting to be accepted by a customer, it is different, it seems: [*112] and, upon finding out the forgery, (it has been held,) the banker may recover from the third person.(d)

Cancellation.—A bill of exchange was accepted, payable at Ladbroke's, with a direction written on it, in case of need to apply at Boldero's. The bill was dishonoured at Ladbroke's, and thereupon brought to Boldero's. He, thinking it had been made payable at his house, under that mistake, cancelled the acceptance, but presently observed his mistake, and wrote under it these words,—*cancelled by mistake*, and signed his initials. Nevertheless, he paid the bill, for the honour of the plaintiffs, whose indorsement was on the bill: they were held entitled to recover, upon the bill, against a prior indorser;(e) so that the mistake did not render the bill a nullity between those parties to it.

As a cancellation, by a mistake, of an acceptance, does not bind; so as is well known, an acceptance may be retracted, provided it have not previously been communicated to the holder of the bill, although the acceptance were not originally given by mistake, but with the intention of really paying the bill at maturity.(f)

Protested Bill.—A customer of a bank, upon whom a bill has been drawn, payable at the banker's, remits money to them, to meet and take up the bill, two days after it became due; the bankers, on tendering the money to the holder of the bill, find it has been sent back to the indorser protested for non-acceptance; they are not liable to the holder, if, on

(c) Deacon v. Stodhart, 2 M. & Gra. 317.

(d) Cocks v. Masterman, 9 B. & C. 902, 908.

(d) Fuller v. Smith, 1 Car. & P. 197.

(e) Raper v. Birkbeck, 15 East, 17.

(f) Cox v. Troy, 5 B. & A. 474.

having received fresh orders from the customer not to pay the bill, they refuse to do so, when it is presented subsequently by the holder. (g)

[*113] *Money paid in, by a customer, expressly for the purpose of paying a bill, accepted by him, and lying at the bank for payment, is money paid and received to the use of the owner of the bill, and cannot be applied to the general account of the customer. (h)

Refusal to pay.—Even if a banker, at whose house a bill is accepted payable, by mistake, (not under circumstances showing want of due care,) cancel the acceptance and refuse to pay the bill, he does not necessarily render himself liable to the holder, in an action on the case, or otherwise; for instance, he will not be liable, if he have no effects of the acceptor's to meet the bill. (i)

Refusal to take.—The holder of a bill may refuse, as has already been stated, to take an acceptance payable at a banker's; on the other hand, the acceptor may refuse to pay a bill, which, after a general acceptance by him, has been, without his consent, altered so as to appear to be payable at a banker's, but he cannot avail himself of this defence, on the traverse of the acceptance, in an action by the indorsee, such alteration not rendering a new stamp necessary, (j) but it must be specially pleaded. (k) The ground is, that the contract is, by the alteration, made a different one, from that into which he entered. (l) But it does not appear that such an alteration of the bill, as an acceptance, by mistake, *et c. gra.*, as in the last paragraph, operates to affect, in any way, the liabilities of the other parties to the bill, both because such is not, it is believed, the usage of merchants, and because such alteration does not, [*114] in fact, vary the contract *into which the other parties enter, with respect to the bill; for the liability, which they originally undertook, was to pay the bill, in case the drawee did not, and the refusal to accept merely ascertains and announces, that he will not make himself liable to pay. It is, therefore, submitted, that such alteration is not a material alteration, such as to destroy the validity of the instrument *in toto*, within the meaning of the principle, as applied to deeds, and negotiable and other instruments of contract. (m)

Promissory Notes.—Promissory notes, it must be observed, are not within the above-mentioned statute, 1 & 2 Geo. IV. c. 78; the consequence is, to make it necessary, in suing on a promissory note, made payable, in the body of it, at a bank, to aver in the declaration, and to prove at the trial, presentment at the bank, (n) and, in this respect, there is no distinction between notes which are negotiable and those which are not so. (o)

(g) *Stewart v. Fry*, 1 Moore, 74.

(h) *De Bernaldes v. Fuller*, 14 East, 590, n.; see 12 M. & W. 631.

(i) *Novelli v. Rossi*, 2 B. & Ad. 757; *Warwick v. Rogers*, 5 M. & Gra. 340, 352.

(j) See per Parke, B., *Mason v. Bradley*, 11 M. & W. 594.

(k) Per Parke, B., *Parry v. Nicholson*, 2 Dowl. & L. 641; see *Davidson v. Cooper*, 11 M. & W. 787.

(l) *Burchfield v. Moore*, 23 L. J., Q. B. 261.

(m) S. C., 13 M. & W. 780, overruling *Calvert v. Baker*, 4 M. & W. 417; see *Davidson v. Cooper*, 11 M. & W. 802; compare 2 Bulstr. 79.

(n) *Emblin v. Dartnell*, 12 M. & W. 830; *Vanderdonckt v. Thelusson*, 19 L. J., C. B. 13; S. C., 8 C. B. 812; *Sands v. Clark*, 8 C. B. 751.

(o) *Spindler v. Grellett*, 1 Exch. 384.

Where, however, the place of payment is not mentioned *in the body of the note*, but merely in a memorandum, then it is no part of the contract that the note should be payable at the bank, &c., and it is not necessary to allege it to be so, *(p)* and so presentment there is not necessary; *(q)* and in such case, an averment that the note was payable at the bank, is not only not necessary, but, if made, will be a fatal misdescription of the instrument. *(r)*

*CHAPTER IV.

[*115]

ORDERS ON BANKERS.

ONE of the duties of bankers towards their customers is, in general, to obey the orders, written or oral, of their customers, with respect to the accounts, of the customers, with them. Some decisions have been made, on written orders of this nature, which may usefully be stated.

A customer writes to his bankers thus:—

Waterford, July 8, 1822.

I request you to hold me 400*l.* from my private account to the disposal of J. Mintern & Co.

MESSRS. MINET & STRIDE.

WM. GIBSON.

The customer delivered this order to one of Minterns' house, the 8th July, when there was in the bankers' hands, a balance of 400*l.* in his favour; the order was not delivered to the bankers until about the 13th July; on receiving it, one of the bankers wrote, on the debit side of the customer's account, "N. B. By Mr. Gibson's (the customer's) letter of 9th of July, 1822, 400*l.* is to be held at the disposal of Messrs. J. Mintern and Co." On the 19th March, 1823, the customer countermanded the order; the bankers communicated this to J. Mintern and Co., and asked their direction. Mintern and Co., who also banked with the same bankers, wrote to them, to place the 400*l.* to the credit of their account. The bankers did so, and then informed the customer, that they had transferred the money to Minterns. Nevertheless, it was held, that they were wrong in doing so, for that the countermand was good, inasmuch as, at the time it was given, no payment, and no appropriation, *had been made; *(a)* the jury finding that the order was executory, [*116] and had not been acted upon. *(a)*

Nearly the same thing, in effect, had already been decided, in a case

(p) Saunderson v. Judge, 2 H. Bla. 510; Masters v. Baretto, 19 L. J., C. B. 50; per Lord Campbell, C. J., Warrington v. Early, 23 L. J., Q. B. 48.

(q) Williams v. Waring, 10 B. & C. 2.

(r) Exon v. Russell, 4 M. & Selw. 505, compare Pannell v. Woodroffe, reported in Chitty on Bills, 254, (6th edit.)

(a) Gibson v. Minet, 1 Car. & P. 247: S. C., 9 J. B. Moo. 31; 2 Bing. 7; the memorandum on the account did not amount to an assent. See Wedlake v. Hurley, 1 Cro. & J. 83.

where a person receives a letter from his debtor, stating, that he has remitted bills to his bankers, out of which the debt is to be paid. The bankers refuse to indorse the bills away, or otherwise to act on the instructions they have received, and it is considered, that the property in the bills, and their produce, still continues in the remitter.^(b) The bankers got the proceeds of the bills when due, but, from the first, had refused to hold them on the specified terms; and the money, so held, was considered to have been money had and received to the use of the remitter generally. They never became the agents of the creditor; had they once assented to hold the money, to the use of the creditor, they could not have retracted,^(b) for then there would have been an appropriation irrevocable, except by the consent of all parties.^(c) In equity, however, it seems, that there may be a good assignment of a debt, due to the assignor, from a third party, without the assent of the third party.^(d) In the above case, it will be observed, the bankers never became debtors to the remitter on the proposed terms. On the other hand, if the bankers had paid the money to the third party, such payment would have been good, at least, if they had acquiesced in the order; and they would have been discharged as against their customer.^(e)

In circumstances, it seems, such orders on bankers might assume the character of bills, and require stamps,^(f) and it would appear, that they [*117] might be obligatory, though the word pay were not used, if equivalent words, such as "credit in cash," were used.^(g)

Such an order need not be in writing, as has been before stated; and therefore, if a man held a bill of exchange, of which another was the acceptor, and both were to go together to a banker, who had money of the acceptor's deposited with him, and it was agreed, amongst them, that the banker should hold that money until the bill of exchange should be satisfied, and, if not satisfied, that he should pay the bill out of that money, that would constitute a good consideration, and the arrangement could not be altered afterwards, except by the consent of all parties.^(h) The assent of the banker, to the order, is a recognition that the customer's account with him is in such a state, as to show that he is debtor to the customer, and therefore bound, according to the usage of bankers and to the law, to conform to such orders, as he may receive from the customer, respecting the disposition of the debt; but if the account is not in that state, but he is in advance to the customer, the latter has no right to call upon the banker, to make a further advance, and the banker has, in such case, the option whether he will assent to the order, if given, and he will be perfectly justified in repudiating it.⁽ⁱ⁾

(b) *Williams v. Everett*, 14 East, 598; see *Scott v. Porcher*, 3 Meriv. 652; *Parsons v. Middleton*, 6 Hare, 261.

(c) *Walker v. Roston*, 9 M. & W. 411.

(d) *Rodick v. Gandell*, 12 Beav. 325; S. C., 1 De G. M. & G. 763.

(e) *Wharton v. Walker*, 4 B. & C. 163.

(f) See *Russell v. Powell*, 14 M. & W. 418.

(g) *Ellison v. Collingridge*, 19 L. J., C. B. 268.

(h) *Walker v. Roston*, 9 M. & W. 421.

(i) See instance *Williams v. Everett*, 14 East, 592.

Also it is quite clear, that such an order, when made in writing, does not require a stamp, either as a bill of exchange or as an agreement, provided the order embodies nothing more than a mere direction to hold or pay over money to the party named,^(k) and provided the order be not, previously to its coming to their hands, delivered to the payee: in case of such delivery to the payee, who delivers it to the bankers, a bill stamp is necessary.^(l)

**Order to distribute, &c.*—An order by a person depositing a sum of money at a banker's, that it shall be distributed, in [*118] named sums, between certain named persons, does not make the bankers liable to those persons, or any of them; they are only responsible, for the sum deposited, to the depositor; although they are aware of the destination of the money.^(m) Such an order remains revocable, by the party giving it, until the occurrence of one of two events,—the payment over, by the bankers, to the persons for whom the sum was deposited; or the making of some binding engagement by the bankers with them, which gives the latter a right of action against the former.⁽ⁿ⁾ For instance, had the bankers stated, to those persons, that they held the money for them, having assented to the order of their customer, that would have rendered them liable to the persons for whom they held the money,^(o) for their assent could not be retracted.^(o)

So where my debtor places money in the hands of his banker to be paid over to me, on the happening of a certain event, and the banker assents, I cannot sue the banker until the happening of the event, and only then (as it seems) if he has, besides assenting, conveyed to me notice of his assent.^(p)

Banker as Stakeholder.—But when money is placed in the hands of a banker, as stakeholder, then, like all other stakeholders, his authority, on the one hand, is irrevocable,^(q) and neither party can recover the money until the *event has occurred,^(r) provided the object of [*119] depositing the stake be a lawful one;^(r) and, on the other hand, the party who, by the issue of the event, is declared to be entitled to the stake, may thereon sue the banker for it. Thus, when A. obtained, from the Crown, the use of a piece of land, at a rent, to erect galleries, &c., on, to view a coronation, &c., and underlet part of it to B., on the same terms, and his proportion of the rent was paid by B. to A., but was afterwards deposited in the hands of A.'s bankers, on condition, that if no coronation took place, and A. was remitted the rent by the crown accordingly, B. was to have returned; to him, the sum so deposited. The

(k) Walker v. Rostron, 9 M. & W. 413.

(l) Parsons v. Middleton, 6 Hare, 261.

(m) Pinto v. Santos, 5 Taunt. 447. As to operation of order from a customer to constitute a trust, Gaskell v. Gaskell, 2 Y. & J. 510.

(n) Gibson v. Minet, 2 Bing. 7; Williams v. Everett, 14 East, 592; Scott v. Porcher, 3 Meriv. 652; Lilly v. Hays, 5 A. & E. 548; per Parke, B., Brind v. Hampshire, 1 M. & W. 372; Malcolm v. Scott, 5 Exch. 601; Sewell v. Raby, 6 M. & W. 25; Hutchinson v. Heyworth, 9 A. & E. 375.

(o) Fruhling v. Schroeder, 2 Bing. N. C. 77; Walker v. Rostron, 9 M. & W. 411, 421.

(p) See cases in last two notes.

(q) See 2 M. & W. 372, 373.

(r) Emery v. Richards, 14 M. & W. 728.

coronation took place, but in consequence of the speculation proving unprofitable, the rent was remitted to A., who refused to return the money paid him by B. The Court held, that B. was entitled to recover, from the bankers, the sum deposited.^(s)

Order to obtain Acceptance.—If a person delivers a bill of exchange, to his bankers, to get accepted for him (he being payee,) and acceptance is refused, but they omit to communicate the circumstance to any one, the depositor has a right of action against them, and may recover damages, in proportion to the injury, he can show he has suffered.^(t)

Order to transfer, &c.—We next investigate the effect of an order given by a customer to his bankers, directing them to transfer a sum of money, from his account, to the credit of another person, who also banks with them.

A. is debtor to B. A. desires his bankers, who were indebted to him largely, to place to the credit of B., who was indebted to them, a sum of money (for goods sold,) so as to make the same as a bill of exchange at [*120] one month, which *the bankers consented to do, but only considered it as a payment to be made at a future day. Such a transaction does not amount to a payment; and where the bankers become bankrupt before the day, on which the credit would expire, it is held that A. is not discharged by such inchoate payment.^(u)

Order to place to Credit, &c.—So, where A. pays in money, to be placed to the credit of B., upon a condition; the money in the meantime to stand, in the bankers' books, in the name of A., it is at his risk, and the loss is his, if the bankers fail, before the condition is complied with, though B. had written to desire it to be paid in generally.^(x)

In a case where A., in October, desires B. to pay his rent, then due to A., into A.'s bankers, and, by mistake, the money is not then paid, but B., having also an account at the same bank, orders the amount to be transferred to the credit of A., which was done on Thursday, the 8th December. B. next day writes to A. mentioning this. A., living at a distance, does not receive information till Sunday, 11th December; the bankers having failed Saturday, 10th December. This was held to be a sufficient payment by B., although, at the time of the transfer, B.'s account was overdrawn by 900*l.*, and he had no general directions to pay his rent into the bank.^(y)

Order to hold at Disposal, &c.—Where a customer orders his banker to hold money of his, at the disposal of A., to whom the customer writes word of what he has done, and the banker advises A. accordingly, of the receipt of the order, and of his having registered it, but declines to accept bills for any part of the amount, stating that he is in advance to the customer, adding however that should remittances come [*121] *forward to enable him to meet the wishes of the customer, he would lose no time in advising A. This was held to fall short of an absolute con-

(s) *Truscott v. Marsh*, 2 Dowl. & R. 712.

(t) *Van Wart v. Woolley*, 3 B. & C. 439.

(u) *Pedder v. Watts*, 2 Chitt. R. 619.

(x) *Calley v. Short*, G. Coop. Ch. R. 148.

(y) *Eyles v. Ellis*, 4 Bing. 112.

tract with A., and, therefore, it would be held that A., neither at law(z) nor in equity,(a) had any remedy against the banker.

Order to invest, &c.—Although there is nothing of a fiduciary character in the *ordinary* relations between banker and customer, who are, in those circumstances, simply debtor and creditor; the latter having the right to call for his money, or any part of it, immediately; yet if the dealings between them go beyond this point, in any way, and the banker is employed by the customer to make investments for him, or otherwise to manage his monetary transactions, then the banker is, in that respect, the agent of the customer, and is bound to observe complete good faith in the performance of the customer's orders. Consequently, any fraud in the banker's dealings will be considered culpable in a high degree, and will be severely animadverted on and punished by the courts.

The well-known case of Fauntleroy's fraud has been already stated, in which the partners were held to be affected with knowledge of fraudulent entries made by him in the books, which entries they had in fact never seen.(b)

Another case is the following, which it has been admitted to be difficult to support, except upon the sole ground of the fraud: A. gives orders to her bankers to invest, a certain sum in their hands, for her in the Navy Annuities, which they state to her that they have done, contrary to the truth: afterwards A., as surety, joins B. in a promissory note given to them; the bankers become bankrupts, and Lord Eldon held, on the ground of the fraud, that the money due, in *respect of the sum ordered to be invested should be set off against the [*122] debt for which A. had become surety, and that the assignees should be restrained from suing either A. or B. in respect of the note.(c) Such false representation by bankers has been said to be indictable as a conspiracy.(d)

So with respect to securities deposited with them, as exchequer bills, certificates of shares, coupons, bonds, debentures, either for safe custody, or with the intention that they shall receive the interest or dividends. &c. ;(e) and it is their duty scrupulously to perform the orders of their customers touching the disposition of these deposits.

Persons depositing securities with bankers ought to reflect that, in most cases, they have not, and cannot have, any other guarantee for the safety of their deeds, &c. than the integrity of the partners individually. The following case exemplifies this. A customer of a banking firm, whose practice it was to receive deposits, at their banking house, of boxes of securities belonging to their customers, for safe custody, lent part of the securities contained in his box to the firm, upon an undertaking to replace them in three months, or sooner if required, and he afterwards

(z) *Malcolm v. Scott*, 5 Exch. 601.

(a) S. C., 2 Mac. & G. 601; see 6 Hare, 570.

(b) *Supra*, p. 44, and see *Marsh v. Keating*, 1 Mont. & A. 605; *Ex parte Bolland*, Mont. & M'A. 315.

(c) *Ex parte Stephens*, 11 Ves. 24; see *Ex parte Blagden*, 2 Rose, 249; S. C., 19 Ves. 467.

(d) *Auriol v. Smith*, 18 Ves. 203.

(e) See instance *Glyn v. Baker*, 13 East, 509.

lent other part of such securities to A., one of the partners in the firm, on his own separate account, other securities being, on both occasions, deposited by the respective borrowers, according to agreements, in pledge for those which were borrowed. After the expiration of three months, from the time of the first loan, the firm, with the consent of the customer, deposited other securities in the box in exchange for those first pledged, and afterwards became bankrupt, when it appeared that the customer had been regularly credited, in the books of the firm, with interest on all the securities borrowed, but that A. had, without the knowledge either [*123] of his copartners or the customer, abstracted *the securities pledged by himself upon the second loan, and had applied the proceeds to his own individual use.

Held, 1st, that the value of the securities, lent to the firm, was not a contingent debt within the 6 Geo. IV. c. 16, s. 56,^(f) and that, as there had been *no demand* for their replacement before the bankruptcy, the customer had no proveable debt in respect thereof, either against the joint estate or any of the separate estates.

2nd. That the firm was not responsible for the abstraction, by A., of the securities pledged upon the second loan, although the key of the box, as well as the box itself, was left in the custody of the firm, inasmuch as, it did not appear that the firm had any authority to open the box or to examine its contents; and, consequently, that the customer had no right of proof, in respect of the second loan, against the joint estate, but only against the separate estate of A.

And, *semble*, even if the firm had been chargeable for the abstraction, on the ground of negligence, the claim would have been only a claim for unliquidated damages, and, therefore, not proveable against the joint estate.^(g)

The following case (which illustrates the principle that a partnership creditor has a right to receive payment of his debt, out of the assets of a deceased partner, to the full amount of his demand, against the original firm, and *that* although the demand may arise from a fraud to which the deceased was no party,^(h)) may also be usefully cited here, to exemplify the duties which bankers owe to their clients, and the retribution which falls on the violation of them, reaching often to those who are, in no way, guilty of the crime or fraud in question.

Certain stock was transferred to a partner in a banking house, by way of security, for money borrowed of the firm by a customer. The debt [*124] was subsequently discharged, but *by consent, the stock was not retransferred. The stock was afterwards fraudulently disposed of. Then one of the partners died, and, after his decease, the remaining partners became bankrupt. Lord Eldon held the creditor entitled to have the remaining stock transferred to him, to receive the residue of his debt, if possible, out of the estate of the bankrupt partners, and to go against the deceased partner's estate for the deficiency.⁽ⁱ⁾ As was

(f) See now 12 & 13 Vict. c. 106, s. 177.

(g) *Ex parte Eyre*, 1 Phill. Ch. R. 227. (h) *Oldaker v. Lavender*, 5 Sim. 239.

(i) *Vulliamy v. Noble*, 3 Meriv. 593.

observed by Lord Eldon, and as the principle appears to be indisputably established, "the deceased partner's estate must remain liable, in equity, until the debts which affected him, at the time of his death, have been fully discharged." (i)

In such cases of misapplication of stock, the creditor may elect either to consider the proceeds of the stock as a debt due from the deceased partner's estate, or to have the stock specifically replaced. (k)

Trust Funds.—Again, where a trustee, under a will, permits a trust fund, as the moneys are from time to time realized, to be paid into the hands of bankers who have knowledge of the trust, and one of the firm, without the assent of the trustee, deals with a portion of the fund by investing it on mortgage; there, though the bankers were held not to be jointly and severally liable in the character of trustees, but only under a liability as between banker and customer, yet, on the bankruptcy of the bankers, the trustee could only prove, against their joint estate, for such balance as was in their hands at the time of the bankruptcy; and it seems to be undecided whether the sum laid out on mortgage is to be considered as in their hands, at the time of the bankruptcy, although the mortgage itself must enure for the benefit of the *cestui qui trust*. (l)

Bankers also are treated in some degree as having a fiduciary [*125] character, as regards the payment of cheques, so as to be liable if they honour a cheque, which, they have the means of knowing, is drawn in fraud of the depositor of the fund out of which they pay it. Thus where the receiver of an estate has a private account, and then opens another account, in the name of the estate, in circumstances to affect the bank with knowledge, that the sums placed to that account, belong to the owner of the estate, and then draws a cheque on the estate account and pays it into his private account, the bank is liable for the amount to the owner of the estate. (m)

On the other hand, if a customer pays in a cheque to his account, the bankers cannot refuse to give him credit for it, merely because it has been improperly received. (n)

One of two trustees of a sum of stock, sold it out under a power of attorney, to which he had forged the signature of his co-trustee, and sometime afterwards absconded:

Held, that the Bank of England was compellable, *in a Court of Equity*, to reinvest the stock in the name of the other trustee.

"The liability of the bank is constituted," said the Vice-Chancellor of England (Shadwell,) "by the act of the 11 Geo. IV. & 1 Will. IV. c. 13, by which the four per cents. were converted into three-and-a-half per cents. First of all, certain enactments were made, which had the effect of giving an option to the different proprietors of the four per cents., either to accept the same amount of stock in the three-and-a-half per cents., or to be paid off. The act then provided that the dividends of the newly-created stock should be payable at the Bank of England, and

(i) *Vulliamy v. Noble*, 3 Meriv. 593.

(k) *Baring's case*, 1 Meriv. 611.

(l) *Ex parte Burton*, 3 M. D. & De G. 364.

(m) *Bodenham v. Hoskyns*, 2 De G. M. & G. 903.

(n) *Tassell v. Cooper*, 9 C. B. 509, 526.

that the sums for the payment of them should be issued and paid out of the Consolidated Fund. I notice that, with reference only to that singular ground, on which the Court of King's Bench rested their judgment, in the case of *Davis v. The Bank of England*,^(o) when it was [*126] heard in error; namely, that, inasmuch *as the declaration did not allege that the requisite funds, for payment of the dividends, had been supplied to the bank by the government, there was no liability on the part of the bank. Now, it seems to me, that every court of law ought to take it for granted that that which the legislature says shall be done, has been done; but, however, the court of error was satisfied to get rid of any difficulty, in that case, by making that objection."

"The 10th section of the act provides that books shall be kept by the bank, in which the names of the proprietors of the new stock shall appear. Then, the 13th section, as I understand it, has made it the duty of the Governor and Company of the Bank of England to keep an account, in books to be provided for that purpose, which shall show every transfer and assignment, which is made, by parties appearing to be interested in the stock in question. They are made, if I may use the expression, the parliamentary book-keepers of this fund; and it is a duty which they owe to all the persons who may be interested in the fund, so to keep the account as that it may distinctly appear, at all times, what transfers and assignments have been made. And my opinion is, that if, at any time, there has been stock standing in the name of A., and afterwards that stock did not appear (no matter from what cause) to be standing in his name, A. would *prima facie*, have a right to say, 'Let the account stand as it did on a given day.' If it can be shown that A. himself has transferred the stock, that is an answer; but the bank account ought to be kept, with regard to every individual who ever appeared as a stock proprietor, in such a manner as to show what the account really is."

"If that be so, it follows, as a matter of course, that relief may be had in equity, because the plaintiff in equity has to allege against the bank, 'You are bound, by law, to be my book-keeper in respect of my stock, and to show me the true account of it; and if I can show that, upon a given day, stock stood in my name, and now show that it does not stand [*127] *in my name, and I have not authorized the transfer of it, you are responsible to me; that is to say, you must make the account stand as it ought to have stood.'"

"This appears to me to be the true view of the case; and, according to that view, there would be a direct right in every person who was interested in the stock in question, to file a bill against the Bank of England, to have any error, occasioned by the bank, corrected. It is observable, that an action gives a remedy circuitously only, because all that can be recovered by an action is a certain sum of money, which may or may not be sufficient to buy a fund to replace the stock; and it seems to me that the true view of the case is that which I have taken, and which is formed from the provisions of the act of Parliament."

"And I further think that the view which I have taken is a complete

answer to the argument that, where the account stands in the names of two, they are joint tenants, and each of them may transfer a moiety of the fund. The unsoundness of that argument is apparent from this, that, if it be the right of the joint tenant to transfer a moiety of the fund, he may, (supposing the amount of it to be 4,000*l*.) first transfer 500*l*. Then 500*l*. will remain in the names of himself and his co-tenant, and he may transfer a moiety of that 500*l*.; and so he may go on, transferring moiety after moiety, until the remainder will be less than any assignable quantity. Virtually, he will have the power to transfer the whole; and that will be the result of the doctrine that a joint tenant of a fund has a right to transfer a moiety of it. In my opinion, however, it is apparent, from the plain language of the act of Parliament, that the transfers were to be made, by the parties, in whose names the stock, which was to be made the subject of transfer, stood."

"In this particular case, the very view of the law which I take was adopted by the Bank of England; for no transfer was made, except on the production of that which was, apparently, an authority of the two joint tenants; but it turned *out not to be the authority of the two; and my opinion upon the statute is that, therefore, it was a [*128] nullity: and the bank, having authorized a transfer which they ought not to have sanctioned, are themselves now liable, in a Court of Equity, to restore, to the parties complainant, the stock as it stood immediately before the transfer."(*p*)

Illegal Orders of Customer.—Bankers are not unfrequently liable to be made responsible, for the objects of those who lodge sums with them, to be retained and paid over on a given event. Thus, a banker, who permits a sum of money to be paid into his bank, for the purpose of being paid over, for corruptly procuring an appointment under government, may be indicted, for a conspiracy, along with those who are to procure the appointment and to receive the money.(*q*)

The same principle would seem to apply in case of money in like manner placed with a banker as stakeholder, as it were, to be paid over, after an election, for the purpose of bribery.

So, wherever bankers receive money, and agree to hold it to be paid over for any purpose forbidden by the law, it seems they would be alike liable, for, in such case, an individual stakeholder would be liable, if fixed with a knowledge of the illegal purpose, and bankers are in no different situation from any other individual; they are not, like carriers, innkeepers, &c. obliged to serve all customers, and therefore in some respects protected by the law; it is at their option whether they will open an account, or allow money destined for an illegal object, to be paid in, on an open account.

(*p*) *Sloman v. Bank of England*, 14 Sim. 475, 485.

(*q*) *R. v. Pollman*, 2 Campb. 233. This is at common law. See also 49 Geo. III. c. 126. s. 3, and 49 Geo. III. c. 118.

[*129]

*CHAPTER V.

ACCOUNTABLE RECEIPTS, ETC.

THE subject of accountable receipts, given by bankers, is one of some importance, but one of which the development, by means of judicial decision, does not appear to be in proportion to what one might desire; in other words, but few questions on, or relating to, the subject have been presented to the Courts for decision.

When a person deposits money, with a banker, without intending that it should be called for, from time to time, by cheques, it is sometimes the practice, for bankers, to contract to pay interest on the moneys thus lent to them, and to give an accountable receipt,—that is, a memorandum of the receipt of the principal, an acknowledgment that they are accountable for it on demand, and a promise to pay interest upon it, during the time it remains, in their hands;(a) but the latter clause is not always, or necessarily, a part of the instrument.

The reader will remember that bankers are not liable to pay interest on money deposited with them, in the absence of express contract to do so.(b)

An acknowledgment in this form—

“Mr. T. has left in my hands 200*l*.

“J. A.”

does not require a stamp to make it evidence;(c) and generally, it is enacted, that “receipts given for money deposited *in any bank, [*130] or in the hands of any banker, to be accounted for, whether with interest or not,” are exempt from stamp duty, “provided the same be not expressed to be received of, or by the hands of, any other than the person to whom the same is to be accounted for.”(d)

Change of Firm.—A person depositing money at a banker's, and taking their accountable receipt, does not, by continuing to leave his money in the bank, after a dissolution of the original firm, and the constituting of a new one, consisting of some of the old members and of other persons, discharge the former partners who have gone out, although he receives interest regularly from the new firm, and gives no notice, and continues to transact business, with them, in the common course, and *that* for a period of four years, until they become insolvent. Such facts are not sufficient to enable a jury, to come to the conclusion, that he did

(a) *Way v. Bassett*, 5 Hare, 56. Sometimes it is stated expressly not to bear interest, as in *Stapleton v. Stapleton*, 14 Sim. 186, 187.

(b) *Edwards v. Vere*, 5 B. & Ad. 282.

(c) *Tomkins v. Ashby*, 6 B. & C. 541; see *Taylor v. Steele*, 16 M. & W. 665; *Huxley v. O'Connor*, 8 Car. & P. 204.

(d) 16 & 17 Vict. c. 59, schedule. Acknowledgment by banker of receipt of deposit, by allottee of shares, does not require stamp. *Clarke v. Chaplin*, 1 Exch. 26.

discharge the outgoing members of the firm,^(e) and assent to transfer the credit to the new firm, though he had made fresh deposits with them and received fresh accountable receipts from them.^(e) Of course, the outgoing partners are not liable to the customer, beyond the amount due to him, at the time of their retirement; on the other hand, the incoming partners are not liable, for debts incurred previously to their joining the firm: so that a customer, suing for the balance of his account, is liable to be nonsuited, upon its being shown that one or more of the defendants was not in the firm, at the time, when the cause of action accrued.^(f)

*In the case in which this general principle was recognized, as the Statute of Limitations would have been a bar to a fresh [*131] action, the court—upon affidavits which showed that the defendants had never, during some negotiations, which extended over several years, respecting the subject-matter of the action, raised any question as to their being the proper parties to be sued, and had averred in a bill filed by them against the plaintiff, after pleading and before trial, that the liabilities of the preceding firm had been transferred to the defendants,—set aside the nonsuit, and gave the plaintiff leave to amend the declaration by striking out the two defendants, who had been erroneously sued, (although it appeared upon the bill,) who were the members of the firm when the cause of action accrued.^(f)

If partners give an accountable receipt to A., the usual course of dealing being, to pay interest on the amount mentioned in their receipts, and A. dies, and pending a contest, for the administration of his estate, the accountable receipt comes to the hands of a stranger, who fraudulently gets payment from the bankers, and the receipt is returned to them and cancelled, the administrator of A. may recover, in equity, against the bankers, the principal and interest due upon the receipt, as well as the costs of the proceedings.^(g)

Partnership and Bankruptcy.—A. deposits moneys with B., C. and D., who are partners in banking, carrying on business under that firm, and receives from them promissory notes, in which they promise to pay him the amounts, three months after sight respectively, with interest. In September, 1831, A. dies. In March, 1837, B. dies, having appointed C. and X. his executors. C. and D. continue the banking business, in the same firm as before, till 1842, and interest is regularly paid, on the promissory notes, by the firm until that time. In May, 1842, the customers of the bank *are invited to transfer their accounts to the Isle of Wight Joint-Stock Banking Company. In December, [*132] 1843, C. and D. become bankrupts. In the same month, the executors of A. file their bill in equity, against the executors of B. and the devisees

(e) Gough v. Davies, 4 Price, 200; Daniel v. Cross, 3 Ves. 277; see Blew v. Wyatt, 5 Car. & P. 397. See as to evidence, to show knowledge of retirement from banking firm and intention to credit new firm. Hart v. Alexander, 2 M. & W. 484. It might, in some cases, be found in practice more desirable for the customer to transfer the credit to the new firm, as regards the question of enforcing the responsibility. Lyth v. Ault, 21 L. J., Exch. 217.

(f) Craufurd v. Cocks, 6 Exch. 290. (g) Pearce v. Cresswick, 2 Hare, 286.

under his will, for payment of the amounts of the promissory notes, out of the personalty, or real estate of B. The acts of the surviving partners of B. were held not to have the effect of taking the debt, upon the notes, out of the operation of the Statute of Limitations, as against the real or personal estate of the deceased partner; for that acts done by one of the surviving partners, who was executor of the deceased partner,—which acts the surviving partners, as such, were bound to do,—could not *prima facie* be considered to have been done in the character of executor. The notes were dated respectively—21st January, 1826; 22nd January, 1831; 28th February, 1835; the last being received, by the executors of A., for moneys deposited by them, on that date.^(h) This case is obviously well deserving of notice, as regards the effect of the Statute of Limitations.

A., to whom the Sheffield and Rotherham Bank was indebted, takes accountable receipts for the sums due from the bank.

The course of dealing was, that as long as the sums, for which these receipts were given, remained in the bankers' hands, the receipts were returned to the bank once a year to be cancelled, when the interest, for the past year, was either paid or allowed in account, and fresh receipts, in place of the cancelled ones, were given.

A. died, and, pending a contest for the administration of his estate, the above-mentioned accountable receipts came into the hands of a stranger, who, by a fraud, obtained payment of the sums due upon them; the receipts were returned; and they were afterwards cancelled by tearing off the signature at the foot.

[*133] The administrator of A. was held, there being nothing to *show that the receipts were transferable so as to entitle the holder to demand payment of the sums represented by them, to be in a position to maintain a suit in equity, against the bank, for payment of those sums.⁽ⁱ⁾

Here, it is to be observed, the mode in which payment was obtained was this:—The receipts were presented at the Worksof Branch of the Nottinghamshire Bank, with an indorsement purporting to be that of A., and it being unknown to the manager, &c., of that branch that A. was dead, the money was paid and the receipts given up; their account was, in the course of business, charged by the Nottinghamshire Bank to their London bankers, to whom the receipts were remitted; shortly afterwards, the Sheffield and Rotherham Bank direct the same London bankers to give credit to the Nottinghamshire Bank for the amount, and the receipts were delivered up, to the Sheffield and Rotherham Bank, who were, therefore, wholly innocent.⁽ⁱ⁾

Infancy.—Bankers cannot, at common law, as it seems, bind themselves, by an accountable receipt, for money deposited with them, given to or on behalf of an infant.^(k) But, in equity, bankers may enter into a valid accountable receipt, or promissory note having the same effect as an accountable receipt, with a trustee for an infant. Thus, where bankers made a promissory note in the following form:—

(h) *Way v. Bassett*, 5 Hare, 55; see *Fordham v. Willis*, 10 Hare, 217.

(i) *Pearce v. Creswick*, 2 Hare, 286. (k) *Calland v. Lloyd*, 6 M. & W. 26.

Fourteen days after sight, I promise to pay to Mrs. H. O., trustee for J. R. W., or order, 2000*l*. with interest at two and a half per cent.

For O. B. M. and HANBURY.

(Signed) DANIEL HANBURY.

and the account was kept in the name of Mrs. H. O., as trustee for the above-named person, an infant, these acts were held to be complete to constitute her a trustee for the infant; and the bankers were held to have done rightly, at *her death, in paying over the money to her executor, since, as representing Mrs. H. O., the trust devolved upon [*134] him.⁽ⁿ⁾

Where, however, money was transferred in the books of bankers, by order of a customer, to the account of certain persons, of whom the customer was one, but there was nothing to show that the others had ever had notice, and there was some evidence that the transfer had been ordered with the fraudulent intent of evading legacy duty,^(o) and that he had shown an intention to exercise acts of ownership over the fund; there, although the interest, allowed by the bank, had been duly carried to the credit of the account, it was held, that this was a declaration of trust which was imperfect; that it might have been revoked, in which case the trustees could not have recovered from the bankers, on the one hand, and the bankers on the other, could not have refused to pay to the customer.^(p)

But where one of the partners, in a banking firm, opened an account with the firm, in his wife's name, for the education of certain infant children, and caused an accountable receipt to be signed, by the other partner, on behalf of the firm, purporting to be for 800*l*., received from the wife for the education of the children, and caused that sum to be placed to the credit of the account so opened in the wife's name, and his private account to be debited with the same, the transaction was considered to embody a complete and irrevocable declaration of trust in favour of the children.^(q)

Alteration.—Altering the sum, for which an accountable receipt is given, is altering in a material part, and indictable as forgery.^(r)

By 11 Geo. IV. and 1 Will. IV. c. 66, s. 10, it is felony *to [*135] forge an accountable receipt, whether for goods or money, or for any note, bill, or other security, for payment of money; and the same of altering, and of offering, uttering, disposing of, or putting off, knowing the same to be forged or altered, any such accountable receipt, with intent to defraud any person whatsoever.^(s)

Operation of Acc. Rec.—Where it was the practice of a bank to treat such receipt, with the depositor's name thereon, as an order for the pay-

(n) *Wheatley v. Purr*, 1 Keen, 551; see *Stapleton v. Stapleton*, 14 Sim. 186; and see 1 Phill. 55.

(o) See *Holliday v. Atkinson*, 5 B. & C. 531.

(p) *Gaskell v. Gaskell*, 2 Y. & J. 510.

(q) *Stapleton v. Stapleton*, 14 Sim. 186.

(r) *Reg. v. Johnston*, 5 Cox, C. C. 133.

(s) As to the punishment, see that stat. and sect. and 16 & 17 Vict. c. 90, ss. 1, 2, 3.

ment of the money deposited, and interest, upon the receipt being presented to them; and the defendant took the receipt to the bank, and, having written the depositor's name thereon, delivered it to the bankers, who paid him the principal and interest due thereon; it was held, that he was properly convicted, under an indictment framed upon sect. 3 of the above statute, as for a forgery of an order for the payment of money.^(t)

A scrip certificate in a railway company, is neither "an accountable receipt," nor "an acquittance or receipt," within the meaning of sect. 10, of the above statute, and therefore the forgery of such document is not a felony, but a misdemeanor only.^(u)

"*One's Account with one's Banker*," is a mode of speaking very commonly used; and on that ground it seems desirable to ascertain, if possible, the legal effect of the term. Now, the correct application of the phrase is made, only when it is used of an immediate account, on which a person can draw: and it is not justly applicable in a case where a person, having an immediate account with a provincial bank, which has for correspondents and agents a banking house in London, speaks of having [*136] an account with the *latter house; and, if he orders his debtors to pay in moneys to the latter house, and the former stops payment, the accounts between the houses being unsettled, he cannot recover the moneys from the latter. Also, the debtors having paid in the moneys in obedience to a letter from the creditor, ordering them to pay in "for our account," and having no directions of a more specific nature, will be held to be discharged.^(x)

Deposit Receipts may be given by bankers, in such a way as to cause a double liability; as, for instance, took place under the following circumstances.

John O'Brien, father of Daniel O'Brien and Catherine Callaghan, lodged a sum of 150*l.* in a bank, upon a deposit receipt, in his own name. Upon Daniel's producing the receipt sometime afterwards, and demanding the interest, he was refused, the bank paying only to the depositor in person; John, upon this, used, for some time, to come, along with Daniel, and receive the interest, &c., taking the fresh receipt in his (John's) name, on each occasion. Afterwards he obtained permission, that Daniel should receive payments upon producing the receipt, indorsed by John. Then Daniel, by his directions, pays an additional sum of 5*l.* into the bank, and obtains a new deposit receipt for the whole amount then in the hands of the bank, being 135*l.*, but in the name of Catherine O'Brien, (afterwards Callaghan,) Daniel telling the manager that his father intended 135*l.* to be the portion of his daughter Catherine, but desired to retain a control over it during his life, and that he wished the deposit receipt should be drawn in her name. In a few days afterwards, John O'Brien died, Daniel took out administration, *testamento annexo*, and, as administrator, claimed the 135*l.* Shortly after, Catherine married, and she and her husband demanded payment of this money. Both

(t) Reg. v. Atkinson, Car. & M. 325. See 1 Car. & K. 751.

(u) Clark v. Newsom, 1 Exch. 131.

(x) Breed v. Green, Holt, N. P. R. 205.

Daniel and Catherine, with her husband, commenced *actions against the bankers, who filed a bill of interpleader against both; [*137] but the bill was dismissed, this not being the case of a double demand for one duty, but a case in which there may be two liabilities; and a mere pretext of conflicting claims will not support a bill of interpleader; the court is bound to see that there is a question to be tried. Here the transaction created a debt from the bank to Catherine, in consequence of the mode of dealing adopted by the bank; they were not at liberty to resist her demand, or to treat the case as one of interpleader, because John's representative, who made the last deposit, and took the new receipt, chose to rescind the whole transaction. It is quite consistent with this view, that John's representative may still be able to recover against the bank; but it is their own fault, if they created a new liability in themselves, without obtaining a sufficient discharge from the original title to the money in their hands.(y)

The bank, in the above case, applied for the bill of interpleader; but it was pointed out, by the court, that in so doing, they asked it to destroy their own mode of dealing: for, if the cancellation of the old receipt, and the issuing of the new receipt, did not create a liability to the person named on the new receipt, the bankers' system of deposit receipts was defective.

*CHAPTER VI.

[*138]

DEPOSITS OF SECURITIES.

WE will next trace the rules of law which regulate the obligations and rights of bankers, with respect to bills of exchange, and other securities, *deposited* with them by their customers and others. Questions of this nature commonly arise between the customer, or other depositor, on the one hand, and the assignees of the bankers, upon their bankruptcy, on the other.

Deposits for specified Purposes.—The primary or general rule is, that when a banker is employed as an agent, with whom undue bills are deposited by the customer, in order that the banker may receive the proceeds, when the bills become due, or for any other specific purpose,(a) and the banker becomes bankrupt, having the bills, intrusted to him, remaining in specie in his hands, they continue the property of the customer, and do not pass to the assignees, and he may reclaim them in specie from the assignees.

But, on the other hand, if bills of exchange are remitted to the banker, on the general account, between him and the customer, and are not distinguished from the cash items of the account, they cannot be reclaimed by the customer from the assignees. In other words, if the

(y) *Cochrane v. O'Brien*, 2 Jo. & L. 388, per Sugden, C., Irel.

(a) *Belcher v. Campbell*, 8 Q. B. 11.

relation of principal and agent was the relation of the customer and the banker, with respect to the bills at the time of the latter's bankruptcy, the customer may recover in trover from the assignees; if the relation had passed into that of debtor and creditor at the time of the bankruptcy, [*139] then the customer *has no such right of action against the assignees, (b) although the customer might, of course, have sued the banker, for the amount of the bills, as soon as they were entered *as cash* to the customer's credit, and the books of the banker would have been evidence against him on this point.

This general rule, that bills deposited or remitted, for the purpose of the banker's receiving the proceeds when due, continue the property of the customer, if, at the time of the bankruptcy, they remain in specie in the hands of the banker, will be applied in all cases, where there is no bargain between the customer and the banker, that, as soon as the bills reached the banker, the property in them should be changed; and such bargain cannot be inferred, from circumstances which fail to show any consideration for the customer's assent, as it would be unreasonable in the banker to ask, and imprudent in the customer to accede, to such terms, in the absence of a consideration.

In one case, (which has been fully confirmed,) the course of dealing between the customer and the bank, and the usage of the banking trade throughout the county (of Lancaster,) was shown to be in accordance with the following facts:—

The account, in the case in question, was kept in this form in the pass book, or banking book.

A. B. (the customer,) in account with C. D. (the banker.)

<i>Dr.</i>				<i>Cr.</i>
1821.		£ s. d.	1821.	£ s. d.
July 4.—To Bank,	80	0 0	July 1.—By Balance,	1,300 0 0
“ 5.—To draft,	100	0 0	“ 2.—By Bills,	750 0 0

[*140] *At the end of every half-year, an account was sent in to the customer from the banker. In the account of Christmas, 1821, and also in the pass-book, a bill for 689*l.* 1*s.*, (one of those in question, in an action of trover, brought by the customer, against the assignees of the bankrupt banker,) was included, being one of several bills, paid in on the 10th December, 1821, and it formed part of the cash balance of 911*l.* 2*s.* 5*d.*, therein stated to be due to the customer. When the customers paid bills into the bank, the above usage was, that (provided the banker approved of the bills,) they were never written short, but entered *on the day they were paid in*, both in the pass-book, and in the books of the bank, to the credit of the customer, in the form above stated; and after such entry, the customer was at liberty to draw to the full amount appearing to his credit, by cheques on the bank. Bills

(b) See *Ex parte Oursell*, Ambler, 237; *Ex parte Sarjeant*, 1 Rose, 153, which are applications of the above rule of law to the several facts of those cases. The general rule is established by *Scott v. Surman*, Willes, 400; *Bolton v. Puller*, 1 B. & P. 539; *Thompson v. Giles*, 2 B. & C. 422; confirmed in *Ex parte Atkins*, 3 M. D. & De G. 103.

disapproved of were not so entered, but were sometimes returned, sometimes deposited till due. *All bills so entered, whether made specially payable to the customer, or not, were indorsed by him*, or if, for any private reasons, he did not wish his name to appear on the bills, a letter was given to the bank, acknowledging himself to be equally liable, as if he had indorsed. An interest account was kept, not in the pass-book, but in the books of the bank, in which the customer was debited with interest, on each cash payment to him, from the date of the payment; and on each payment in bills, from the period when the bills were due and paid, and, on the other hand, he had credit for interest, from the date of each cash payment by him, and from the period when each bill, paid in by him, became due, and was paid. As the accounts were balanced half-yearly, if a bill was paid in, which did not become due before the end of the half-year, the customer was debited with the interest up to the time when the bill was due. The balance only of the interest was entered in the pass-book, and this was the usual mode of keeping an interest account. If only the undue bills paid in by the *customer were taken out of his account, in this case, as made up to the 31st December, 1821, the customer's account would, [*141] at that date, appear to be overdrawn; but some of the payments made, by the banker to the customer, were made in bills payable at future times, and some of them were also undue on 31st December, 1821, and if all the undue bills, on both sides, had been taken out of the account, the customer would have been made creditor, on that account.

At the period of the bankruptcy, the cash balance was in favour of the customer, exclusive of the bills in question. It was proved to be the constant usage, and course of dealing, of this bank and of others in the county of Lancaster, to use bills, so paid in, by paying them away to their customers as they thought fit.

No direct proof was given that the customer, in this case, was acquainted with this practice, and the customer never received any thing, in this case, from the banker but cash, notes and bills, drawn by the banker upon his London agents.(c)

On these facts and the usage above stated, it was contended, that a bargain or contract between the customer and banker was to be inferred, to the effect that bills so deposited by the former were to become the property of the banker, upon reaching his hands. But the court considered that, though it appeared to be the practice to carry the amount of the bills to the cash column of the account, the bills were entered, not as cash, but as bills,(d) and that, although the amount was so carried to the cash column, it did not follow *that the customer assented to their being considered as cash. That merely amounted to an [*142]

(c) *Thompson v. Giles*, 2 B. & C. 422. The usage of bankers was again stated to prevail in Lancashire to the above effect, in the case of *Ex parte Armitstead*, in re Dilworth & Co., bankers in Lancaster; cor. *Ld. Lyndhurst*, C., 1827, 1828, reported 2 Gly. & J. 379.

(d) *Thompson v. Giles*, 2 B. & C. 431, 432. Even if they had been entered as cash, *that* would have admitted of explanation; *Giles v. Perkins*, 9 East, 12; and the customer, even in that case, might be shown to be entitled to the bills. *Ex parte Sarjeant*, 1 Rose, 153, per Bayley, J., 2 B. & C. 430.

undertaking on the part of the bank to answer cheques in advance, to the amount of the bills so entered. By indorsing the bills paid in, or by giving a guarantee, when he did not choose to indorse, the customer might enable the banker to negotiate the bills, and, in such case, a *bonâ fide* holder might have a right to retain them. But the banker could only be justified in negotiating them, when that was rendered a reasonable course, by the state of the customer's account. The custom or usage of bankers in Lancashire was stated to be, it will be observed, to use bills paid in by their customers; but it was not stated to be the usage that the bankers should so use the bills, as their own, *without reference to the condition of the customer's account*.

On the whole of the case, it was concluded, that there was no foundation for supposing a bargain to have been made, enabling the banker to use, as his own, bills deposited with him; (d) and the customer recovered the bills from the assignees.

This decision, it will be observed, is in accordance with the general position:—if a customer put bills into his banker's hands, although that gives him a right to expect that his cheques will be honoured to the amount of the bills paid in; still they remain *his* property, subject to any lien the banker may have on them, to the extent of his advances. (e)

Order and Disposition.—Bills in such circumstances are not in the order and disposition of the banker, within the Bankrupt Laws; for a banker, in this relation to his customer, is a factor for money, within the meaning of the exception of factor in those laws; (f) and it is well [*143] known *that bankers receive bills as factors, or agents, to get payment of them when due. (f)

Entering Bills as Cash.—The entry as cash in the banker's books of such bills, would not, of itself, change the property; (g) for a banker's books cannot be evidence for him, though they may be against him; and the assent of the customer to the bills being considered as cash, must be proved in such case; the *onus* of proving it being on the banker; (h) also, it is hard to suppose that, by entering the full amount in the cash column of the account, the banker intended to debit himself presently, with the whole sum, to be received in future, on the bills. In order to change the property, it must be shown that the banker bought the bills, or what is in general the same thing, discounted them; then the customer might have immediately sued the banker for the price which the banker had agreed to give for the bills, but still retained in his hands; and if the customer did not indorse the bills, and they were afterwards dishonoured, the banker would have no remedy against him. (i)

In the pass-book in the above case, it will be observed, the bills were

(d) See note (d), preceding page.

(e) Per Holroyd, J., 2 B. & C. 431, 433.

(f) 2 B. & C. 431, 433, per Lord Eldon, C., 1 Rose, 239, 253; Bryson v. Wylie, per Buller, J., 1 B. & P. 82, n.

(g) Giles v. Perkins, 9 East, 12; Hughes v. Spooner, per Best, J., at Nisi Prius, cited, argu., 2 B. & C. 425, and confirmed. per Holroyd, J., id. 431.

(h) Ex parte Sarjeant, 1 Rose, 153, per Ld. Eldon, C.; see 2 B. & C. 430, 433.

(i) Per Holroyd, J., 2 B. & C. 431, 433.

entered at the full amount, which does not tend to show that they were discounted; nor do the entries in the interest account tend that way. If it had been intended that the bills should become the property of the banker, they would have been entered as cash, deducting the discount.

Property in Bills not due.—It will be observed, to follow as a consequence of the rule above stated, that when the property in bills not due, paid in to a banker's remains in *the customer, if, by any accident, they are destroyed, without the default of the banker, the [*144] loss does not fall upon him, but upon the customer.⁽ⁱ⁾

This, and all other consequences of the rule follow, and the rule itself prevails equally, where the bills are deposited for any other specific purpose, as well as that of receiving the amount when due.^(k)

There is no doubt, however, that bills *may be paid in*, under circumstances, furnishing evidence of a transfer of the property in them, from the customer to the banker; that is a question of fact, to be determined by a jury, upon the whole of the circumstances in evidence.^(l)

Liability of Bankers criminally.—Finally, it may be observed, on the above discussed case, that a pretty clear opinion was expressed, by two out of three learned judges, who decided it, to the effect, that a banker, (notwithstanding that it was the usage of the county of Lancaster amongst bankers,) who negotiated bills intrusted to his care, in the manner stated, knowing himself to be on the eve of bankruptcy, would run great hazard of incurring the penalties enacted in 52 Geo. III. c. 63, a statute passed to prevent the embezzlement of securities for money, &c., deposited for safe custody, or for any special purpose, with bankers, &c.^(l) That statute is now repealed; but provisions are substituted by 7 & 8 Geo. IV. c. 29, ss. 49, 50, by which bankers may, in certain circumstances, render themselves liable to transportation, by misapplying securities intrusted to them.

This enactment^(m) is as follows:—

“And for the punishment of agents intrusted with property, be it enacted: that if any money, or security for the *payment of [*145] money, shall be intrusted to any banker, merchant, broker, attorney, or other agent, *with any direction in writing*, to apply such money, or any part thereof, or the proceeds, or any part of the proceeds, of such security, for any purpose specified in such direction,⁽ⁿ⁾ and he shall, in violation of good faith, and contrary to the purpose so specified, in anywise convert to his own use or benefit such money, security, or proceeds, or any part thereof respectively, every such offender shall be guilty of a misdemeanour, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any

(i) Per Best, J., 2 B. & C. 433. A similar opinion by the Judicial Committee of P. C., *Young v. Bank of Bengal*, 1 Deac. 681.

(k) *Belcher v. Campbell*, 8 Q. B. 11.

(l) See 2 B. & C. 427, 434.

(m) 7 & 8 Geo. IV. c. 29, s. 49.

(n) Both in the case of money and of a security for money, there must be a written direction, and it must be so alleged in the indictment. *Reg. v. Golde*, 2 Moo. & R. 425.

term not exceeding fourteen years, nor less^(o) than seven years, or to suffer such other punishment, by fine or imprisonment, or by both, as the court shall award."

"And if any chattel, or valuable security, or any power of attorney, for the sale or transfer of any share, or interest, in any public stock, or fund, whether *of this kingdom*,^(p) or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, shall be intrusted to any banker, merchant, broker, attorney, or other agent, for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, and he shall, in violation of good faith, and contrary to the object and purpose for which such chattel, security, or power of attorney, shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert, to his own use, or benefit, such chattel or security, or the proceeds of the same, or any part thereof, or the share, or interest, in the stock, or fund, to which [*146] such power of attorney shall *relate, or any part thereof, every such offender shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned."

Now, it will be observed, that, although in the first branch of the section, a *written* direction is required, as an essential, to render the party liable to the punishments therein mentioned, there is no such requirement in the second branch of it, which is nearly a re-enactment, in fewer and more comprehensive words, of the first section of the statute 52 Geo. III. c. 63, already referred to, except that it does not, as that statute does, make it an ingredient in the offence, that it shall be committed, "with intent to defraud the owner or owners of any such instrument or security, or the person or persons depositing the same," &c.: so that, to the latter branch of the clause, the expression of opinion, mentioned above,^(q) seems to apply, at present; and it may, therefore, be proper to point out the hazard which bankers incur, who so negotiate bills deposited with them, as in that case: also, it is clear, that in case of such negotiation being held to be, in itself, a misdemeanour, under the above last-mentioned branch of the clause,—that is, where there is no written direction,—it would be no excuse to show, that what the defendants did, was according to the usage of bankers, in the district, or county, in which they carried on business. Nor would any other excuse avail, unless they could bring the case within the meaning of the subjoined provisoes, or either of them, as follows:—

"Provided always,^(r) that nothing hereinbefore contained, relating to agents, shall affect any trustee, in or under any instrument whatever, or any mortgage of any property, real or personal, in respect of any act,

(o) See *R. v. White*, 4 Car. & P. 46, as to evidence. Transportation for less than fourteen years abolished, 16 & 17 Vict. c. 99, s. 1.

(p) N. B.—Since the union with Scotland there is no longer a kingdom of England. Per Wilmut, J., *King v. Walker*, 1 W. Bla. 287; so 1 Bla. C. 96; 1 A. & E. 589; 1 Mood. C. C. 349.

(q) *Supra*, p. 129.

(r) 7 & 8 Geo. IV. c. 29, s. 50.

done by *such trustee or mortgagee, in relation to the property [*147] comprised in, or affected by, any such trust or mortgage; nor shall restrain any banker, merchant, broker, attorney, or other agent, from receiving any money which shall be, or become, actually due or payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this act had not been passed; (s) nor from selling, transferring, or otherwise disposing of, any securities or effects in his possession, upon which he shall have any lien, claim, or demand, entitling him by law so to do, unless such sale, transfer, or other disposal, shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim or demand."

It is further provided, (t) as follows:—

"Provided always, that nothing in this act contained, nor any proceeding, conviction or judgment, to be had or taken thereupon against any banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall prevent, lessen, or impeach any remedy at law or in equity, which any party, aggrieved by any such offence, might or would have had if this act had not been passed; but, nevertheless, the conviction of any such offender shall not be received in evidence, in any action at law or suit in equity, against him; and no banker, merchant, broker, factor, or other agent as aforesaid, shall be liable to be convicted by any evidence whatever as an offender against this act, in respect of any act done by him, if he shall, at any time previously to his being indicted for such offence, have disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit or proceeding, which shall have been bona fide instituted by any party aggrieved, or if he shall have disclosed the same in any *examination or [*148] deposition before any commissioners of bankrupt."

In a case of great importance and notoriety, in which certain bankers, Strahan, Paul, and Bates, had fraudulently disposed of a number of Danish bonds, which had been deposited with them, for safe custody, and for the purpose of receiving the dividends upon them, for the use of their customer, who had deposited them, it was attempted to take advantage of this proviso, in the above section, by the bankers becoming bankrupts, and, after they had been arrested and imprisoned on the criminal charge, making a voluntary declaration, in the Court of Bankruptcy, as to the misappropriation of the securities; but the attempt failed; a conviction was obtained, and sentence passed.

The prisoners, William Strahan, Sir John Dean Paul, baronet, and Robert Makin Bates, were indicted at the Central Criminal Court, (u) on the statute 7 & 8 Geo. IV. c. 29, s. 49, for that they, being bankers and agents to John Griffith, clerk, and being intrusted by him with certain

(s) See *Thompson v. Giles*, 2 B. & C. 422, and 7 & 8 Geo. IV. c. 29, s. 1.

(t) 7 & 8 Geo. IV. c. 29, s. 52.

(tt) 7 & 8 Geo. IV. c. 29, s. 52; and see 5 & 6 Vict. c. 39, s. 6; and the case of *Reg. v. Strahan, Paul and Bates*, Centr. Crim. Cr. 1855.

(u) The trial took place Oct. 26 and Oct. 27, 1855, cor. Alderson, B., Martin B., Willes, J. Sessions Paper, 1854-1855, (Moon, Mayor,) p. 695.

bonds (set out in the indictment) for safe custody, without any authority to pledge or make away with them, in violation of good faith, did sell and convert the same to their own use and benefit.

There were other counts for negotiating, transferring, and pledging the same, and for a conspiracy, respectively.

The prisoners having pleaded not guilty, application was made on their behalf for permission to plead double, by adding a special plea, alleging the fact of the prisoners having made the disclosure above mentioned, with a view of availing themselves of the 52nd section of the statute above set out; but the application being considered as resting on no [*149] authority, and made only to the discretion of the court, *was refused; and, as evidence was afterwards admitted, for the purpose of bringing before the court the steps which had been taken, by the prisoners, in this matter, it may perhaps be now regarded as settled that, in future, any banker, in like circumstances, may avail himself of a defence similar to this, to the criminal charge, under Not guilty, if at all; and that it is not necessary to plead it specially.

It was proved that the prisoners had sold certain Danish bonds, and transferred others belonging to Dr. Griffith, a customer, who had deposited them with the prisoners, as his bankers and agents, for safe custody, and in order that they might obtain, for him, the dividends, as they fell due, and that he had never given them any authority to pawn or sell the same, or any part of them, and that he had never overdrawn his account with them.

For the defence it was proved, that on the 17th June, 1855, one Montague John Tatham filed a petition for adjudication, in bankruptcy, against the prisoners; that they were adjudged bankrupts the same day, and surrendered on the 12th; that they made a statement concerning the disposal of the securities in question, without examination, and not in pursuance of any order of the sitting commissioner; and that they made this declaration, for the general purpose of assisting the creditors, and for the special purpose of making a disclosure under the above-mentioned statute; that they were then questioned, by the solicitor for the *fiat*, as to the truth of the statement, and each answered (affirming its truth) "Yes." The commissioner had, previously to this, refused an application made by counsel, on behalf of the prisoners, to be permitted to examine them, with reference to the statement, as to the disposal of the securities, saying, "If any creditor applies for the bankrupts to be examined, he can do so; but, upon the bankrupt's own application, I refuse it."

The prisoners were convicted on the first and third counts, and sentenced to fourteen years' transportation.

[*150] **Liability of Bankers in Equity.*—The following cases show how far bankers are liable, in equity, as to deposits.

A banker receives a deposit of a parcel, sealed, containing certain American loan certificates, of the alleged value of 40,000*l.*, for the purpose of safe custody, from a person, who, soon after, is imprisoned under civil process, being a partner in a trading firm, which had failed: he sends to demand the deposit; the banker refuses to re-deliver it under

the circumstances, and is then served with attachments out of the Mayor's Court by the creditors of the trading firm. The banker is subsequently sued in trover by the depositor, and held to bail. It was considered that he was entitled to relief in equity, upon a bill of interpleader, but that he need not have come there, as at law he would have been discharged—(at that time)—on common bail, upon bringing the deposit into court; and proceedings in the action would have been staid, till the attachments were disposed of, by the depositor, in the name of the banker; Lord Loughborough, C., saying, it would be a very rash act in any one to pay money to a man, subject to the bankrupt laws, who was in prison at the time; that he thought the banker had a right of action against the depositor, on the ground of the holding him to bail; (x) that it being known that a person lying two months in prison is subject to the bankrupt laws, and, therefore, that a payment made in the meantime is bad, it is unjust to expect the bankers to trust him, and take upon themselves—without a consideration—the risk of deciding that there was no foundation for his arrest. (x)

In a subsequent case, arising on the bankruptcy of another firm, of Lancaster bankers, in which also the custom or usage of banking there was proved to be, substantially, as above stated, it was decided, that, where certain short bills drawn before, but not payable till after, the bankruptcy took place, (y) had been deposited with the bankers, [*151] and by them negotiated with their correspondents in London, before the bankruptcy, the proprietor was entitled to be indemnified, by the London bankers, from the surplus security which they had taken, from the Lancaster bank (being title deeds,) after satisfying their own lien on those securities. It ought to be stated that the London bankers had given credit, to the Lancaster bank, for the amount of the bills, in reduction of their claims upon the Lancaster bank; also the balance of account, between the customer, who was owner of the bills, and the Lancaster bank, had always been in his favour. (z)

The result of this decision is to show that, notwithstanding the usage, Dilworth & Co., the bankers, had no right to dispose of the bills, as they did, by transmitting them to the London bankers, and that although bills deposited, in like circumstances, had been, in the half-yearly accounts, sent to the customer, since the commencement of his account with the bank in 1822, considered as cash *without objection on his part*, that did not amount to a permission to discount or negotiate. (z)

In a second case, arising on the bankruptcy of the same firm of Dilworth & Co., of Lancaster, it was ruled, that a customer was not entitled to recover *short* bills, in the hands of his bankers, on their bankruptcy, where the habit of dealing between the parties was such, as to warrant an inference, that they mutually considered and treated such bills as cash. The bills in question were indorsed by the customer generally, and paid into the bank, and indorsed by the bankers to their London cor-

(x) Langston v. Boylston, 2 Ves. jun. 101, 109.

(y) See Mont. & M'A. 108, n. Date of bankruptcy, Feb. 13, 1826. 1 Dea. & C. 411; as to usage, see sup. 140-142.

(z) Ex parte Armitstead, 2 Gly. & J. 371, 379.

respondents. These bills were drawn previous to, but were not due until after, the bankruptcy.(a)

[*152] **Short Bills—Entering short—Liability of Banker.*—The terms “short bills,” and “entering bills short,” are very frequently met with, in cases relating to the law of bankers, being technical expressions, used amongst persons engaged in banking: it is desirable, therefore, before proceeding further, to state the meaning that is attached to the words.

When, upon the receipt from a customer, of an undue bill, the banker does not carry the amount directly to the former's credit, as for a payment of so much cash, into his account, but notes down the receipt of the bill, in the customer's account, with its amount, and the time when due, in a previous column of the same page, he (the banker) is said to “enter those bills short.”(b) And the bills, when so entered, are commonly said to be “short bills.”(c) Though, whether they will be considered so by the courts, does not depend upon the particular mode in which they are entered, but upon the dealings between the parties, and the circumstances. Such bills, in the absence of special agreement between the parties, to the contrary, or habits of dealing, from which such agreement may be inferred, are considered in the nature of a deposit; the property in them is not changed; on the bankruptcy of the banker, with them in his hands, they may be recovered.(d)

On the subject of short bills, it may be proper to add, to what fell from the court in the Lancaster cases, respecting the hazard which a banker runs, who has intrusted to him any valuable security for safe custody, or for any other special purpose, without authority to negotiate, transfer, or pledge, and, nevertheless, in violation of good faith, and contrary to [*153] the object of the trust, he takes upon him to *transfer, pledge, or in any manner convert such security: that a banker, appropriating short bills to his own purposes and use, would probably be indictable, for embezzlement, under 7 & 8 Geo. IV. c. 29, s. 49; at all events, a banker, who has pledged a short bill of a customer, will be refused his certificate of discharge on his bankruptcy.(e)

In some other cases, it has appeared to be the usage of some country banking houses, to enter undue bills, that are deposited, to the credit of the customer, giving him either cash for them, or liberty to draw for the amount upon the bank, the customer always indorsing the bills. The practice of London bankers is to enter as above just stated. The difference between the effect of the two modes is this: the London banker, if the customer's account be overdrawn, has a lien on the bill deposited

(a) Ex parte Thompson, in re Dilworth, &c., Mont. & M'A. 102; see also Ex parte Benson, in re Dilworth, &c., 1 Denc. & C. 435, and see the observations on the practice of the Lancashire bankers, in the judgments in Thompson v. Giles, 2 B. & C. 430.

(b) Giles v. Perkins, 9 East, 12, 13.

(c) Ex parte Pease, 1 Rose, 232, per Ld. Eldon, C.

(d) Ex parte Dumas, 1 Atk. 233; S. C., 2 Ves. sen. 582; Zinck v. Walker, 2 W. Bla. 1156; Ex parte Atkins, 3 M. D. & D. G. 103; Jombart v. Woollett, 2 My. & C. 402.

(e) Ex parte Sturt, 4 De G. & S. 49; and see 1 Fonbl. R. 84, 113.

with him, though not indorsed. The country banker, who, under this practice, always takes the bill indorsed, has not only a lien upon it, if the customer's account be overdrawn, but has also his legal remedy upon the bill by the indorsement. It is to be observed, however, that under neither system does any lien accrue to the banker, until the customer's account be overdrawn. Moreover, if, at the time of the country banker's bankruptcy, the customer's balance be in his favour, he has a right to recover, *in specie*, all such bills of his, as are in the banker's hands, ^(f) or have been pledged by the banker, to a third person. ^(g)

With respect, however, to the policy of depositing bills, indorsed by the party depositing, the following considerations must be attended to:—

Whether a bill is to be considered as intended to be discounted or deposited, does not depend on whether it is indorsed, but on the question whether it was the intention to *make an absolute transfer, giving [*154] full power to go against all parties to the bill; *or* merely to enable the person with whom it is deposited, to receive the amount from the other parties. Indorsement, however, is *prima facie* evidence of the former. ^(h)

The clearly settled rule is, that, if *indorsed* bills are deposited with a banker, and they are by him negotiated to a third person, though the purpose for which they are deposited be ever so cruelly disappointed, by his becoming bankrupt, the original owner, who deposited or remitted them to the banker, who fails, can have no claim to recover them in trover against such third person; ⁽ⁱ⁾ and, moreover, he can only come in as general creditor of the bankers. ^(k)

Lord Eldon more than once observed, when sitting in bankruptcy, than it ought to be generally known, that if bills indorsed are remitted to bankers, they may dispose of them effectually, though contrary to the faith of the understanding between the parties, and the remitters can only come in as general creditors on the bankruptcy. ^(l)

Permission to discount, given by the customer, for the purpose of reducing the balance, when the banker shall be in advance, is a circumstance controlling his absolute authority over the indorsed bills of his customer. ^(l)

It is to be remembered also, that, as on the one hand, writing bills short, is only evidence, ^(m) to be rebutted by proof of the intentions of, or actual bargains or contracts between, the customer and banker; so, on the other hand, the circumstance of the bills *not* having been written short, amounts to nothing, to show they were taken as cash, “unless there be a concurrence manifested at the time, or to be *inferred, [*155] from the habits of dealing between the parties, that they were to

(f) *Giles v. Perkins*, 9 East, 12, 14. The presumption has been said to be that bills deposited with a banker are short bills. *Ex parte Armitstead*, 2 Gly. & J. 371; see 1 Rose, 243, 254; 5 T. R. 494.

(g) *Collins v. Martin*, 1 B. & P. 648.

(h) *Ex parte Towgood*, 19 Ves. 229.

(i) *Per Cur.*, *Bolton v. Puller*, 1 B. & P. 546. *Collins v. Martin*, *id.* 648.

(k) *Per Ld. Eldon, C.*; *Ex parte Pease*, 1 Rose, 238; *Ex parte Wakefield Bank*, *id.* 246; see *Ex parte Bond*, 1 M. D. & D. G. 15.

(l) *Ex parte Leeds Bank*, 1 Rose, 254. (m) *Ex parte Pease*, 1 Rose, 239.

be considered as cash.”(n) Hence, in a case where such bills were entered, bills and cash together, in the running account, without distinction, in the absence of evidence to show *aliunde* that they were mutually considered as cash, Lord Eldon appears to have thought, that the customer was entitled to the bills, on the bankruptcy of the banker.(o)

Again, if there be a letter accompanying the remittance of bills, and giving directions as to how they shall be dealt with, that is evidence of intention, which cannot be got rid of by the subsequent unauthorized act of the banker in entering the bills short;(p) for the books of a banker not communicated to those dealing with him, are not evidence for him, though he may be evidence for them.(p)

Bills remitted for Sale, &c.—So, whenever bills of exchange are remitted for sale, and the proceeds are directed to be applied to a specific purpose, the property in the bills remains in the remitter, until the purpose, for which they were remitted, is satisfied; and, moreover, the value of the bills may be recovered in *indebitatus assumpsit*, from the purchaser of the bills, who had notice of the purpose for which they were remitted, and of the misapplication of the proceeds by the agent. The bills, in the case in which the above doctrine was recognized, were not indorsed.(q)

A case of the sale of bills, by a factor, is precisely the same in principle, and must be dependent on the same rules of law, as a sale of a bill by a banker; and may, therefore, here be cited in illustration of the foregoing statements, and as elucidating this part of the law of banking.

[*156] A foreign merchant remits bills to his factor, in London, *with directions to sell them, advising him, at the same time, of his intention to draw for the proceeds. The factor receives the bills, and sells them, but, before the receipt of the purchase-money, becomes bankrupt, and dishonours the merchant's drafts for the amount of the bills. The sale in London, of foreign bills of exchange, usually (the report states) takes place on foreign post-days, and it is the custom of merchants, not to pay the purchase-money, until the foreign post-day, next after the day of sale. In this case the bills were remitted on the 21st March, on the 28th they were sold, and the price, according to the above custom, would have been payable on the 31st: on the 30th, the factor stopped payment: on the 20th April following the fiat issued. Here the merchant, and not the assignees of the factor, were held to be entitled to the proceeds of these bills, notwithstanding the bills had been indorsed, both by the principal and the factor, and were sold by the factor in his own name. The factor did not receive a *del credere commission*, nor did he take upon himself any liability, in case of nonpayment of the purchase-money, in respect of such bills, but was accustomed, on such sales, to inform the principal of the names of the purchasers.(r)

(n) Per Ld. Eldon, C., Ex parte Sarjeant, 1 Rose, 154.

(o) Ex parte Sarjeant, 1 Rose, 154, commented on by Bayley, J., 2 B. & C. 430.

(p) Ex parte Pease, 1 Rose, 239.

(q) Muttyloll Seal v. Dent, 8 Moo. P. C. 319.

(r) Ex parte Pauli, 3 Deac. 169. The judgment was rested on Scott v. Surman, Willes, 400.

The following are the facts of a case of celebrity, the judgment in which lays down principles that have always been considered fundamental in this branch of the law.

John Bolton was a merchant at Liverpool; John Forbes and Daniel Gregory, for some years, and until they became bankrupt, were co-partners, and carried on business as merchants in London, under the firm of Burton, Forbes, and Gregory. On the 1st of May, 1774, Forbes and Gregory entered into partnership with one Charles Caldwell and one Thomas Smith, in the trade and business of bankers, to be carried on at Liverpool, under the firm of Charles Caldwell & Co., and so continued to trade until *that house became bankrupt. The house at Liverpool had dealings and transactions with Forbes and Gregory, [*157] carrying on business as merchants, under the firm of Burton, Forbes and Gregory, in London, and between the two houses in Liverpool and London there was an open account current. Bolton, for some years, and until the house at Liverpool became bankrupt, employed that house as his bankers; and they used to procure bills, which had been accepted by him, payable at the house in London, to be there paid when they fell due. Those payments, when made, were carried by the house in London to their account with the house at Liverpool, and by the house at Liverpool to their account with Bolton. In the banking account between Bolton and the house at Liverpool, Bolton was made debtor for cash received of them, and for bills accepted by him, payable at the house in London; and was credited in such account for all bills and cash paid by him into the said house. An interest account was kept between Bolton and the house at Liverpool, which was balanced every three months; and the latter was also allowed a profit on the said account of one quarter per cent. on bills and cash paid, either by them or by the house in London, on their account, for the use of Bolton. Bills having been accepted by Bolton to the amount of 19,702*l.*, payable at the house in London, he on the 28th February, 1793, proposed to the house at Liverpool, that they should procure the same to be paid as they fell due by the house in London, and that to enable the house at Liverpool to provide for such payments, he should deliver to them certain other bills of exchange, whereof those mentioned in the declaration were parcel, with his indorsement thereon; to this proposal the house at Liverpool agreed. In pursuance of this agreement, Bolton on the 1st of March, 1793, and on other days between that day and the 16th of March, in the same year, delivered to the house at Liverpool several bills of exchange, amounting in the whole to the sum of 11,583*l.* 2*s.* 9*d.* *Among these was [*158] the bill for 4,000*l.* mentioned in the declaration. On the 16th of March, 1793, he delivered to the same house other bills, with a cheque on that house (which they received as cash,) to the amount of 912*l.* 1*s.*; among these was the bill for 398*l.* 18*s.* 3*d.*, also mentioned in the declaration. All these bills were the property of Bolton, and duly indorsed by him; the bill for 4,000*l.* having also, previously to the delivery, been accepted by him. On the 4th of March, 1793, the bills accepted by Bolton, payable at the house in London, were, by the house at Liverpool, entered on the debit side of the account between them and Bolton;

and the bills delivered by Bolton to the house at Liverpool were, by them, carried to his credit in the same account, at the times when they were respectively delivered. On the debit side of the books of the house at Liverpool it appeared that Bolton's acceptances, amounting to 19,702*l.* 13*s.* 10*d.*, were entered thus:—"March 4th, 55 acceptances due in April, 19,702*l.* 13*s.* 10*d.*;" and on the credit side, the bills delivered to the house by Bolton were entered, some with the date of their delivery, and the day on which they were to fall due, and some with the former only. On the 2nd of March, 1793, the house at Liverpool remitted the above-mentioned bill for 4,000*l.*, together with other bills, to the amount in the whole of 30,000*l.* and upwards, to the house in London, to be carried to the account of the house at Liverpool; and on the 16th of March, they remitted the above-mentioned bill for 398*l.* 18*s.* 3*d.*, together with other bills, amounting in the whole to 8,000*l.* and upwards, to be carried to the same account. This last bill for 398*l.* 18*s.* 3*d.*, was received by the house in London on the 18th of March, 1793. Some of the bills delivered by Bolton to the house at Liverpool were negotiated by them, and the value received to their own use. On the 28th of February, 1793, and from thence till the bankruptcy of the house at Liverpool, the house in London was largely in advance to the house at Liverpool. On [159] the 16th of March, 1793, the house in London became insolvent and on the 18th of the same month, a commission of bankruptcy issued against them, under which the present defendants were assignees. On the same day the house at Liverpool also became bankrupt, and a joint commission of the same date issued against Charles Caldwell, Thomas Smith, John Forbes, and Daniel Gregory, as partners in the banking-house at Liverpool. The house at Liverpool, at the time of their bankruptcy, was indebted to Bolton in the sum of 2,000*l.* and upwards; and none of that parcel of bills, amounting to 19,702*l.* 13*s.* 10*d.* accepted by Bolton, payable at the house in London, were paid either by that house or by the house at Liverpool, but were paid by Bolton himself. The defendants possessed themselves of the two bills in question, as assignees of Forbes and Gregory, and refused to deliver them on demand.

On these facts Bolton brought an action of trover against the assignees of Forbes and Gregory, to recover the bill for 4,000*l.*, and also the bill for 398*l.* 18*s.* 3*d.*, but failed; after much deliberation, the court laying down the principles—1. Bills in the hands of a banker, in the event of a bankruptcy, are to be delivered up, subject only to the lien, which the banker may have upon them, for the balance of his account; —2. If indorsed bills are deposited with a banker, and are by him negotiated to a third person, though the purpose, for which they were deposited, should be ever so cruelly disappointed, by his becoming bankrupt, the original owner can have no claim to recover them in trover against such third person; held the true nature of the transaction to be this—that Bolton paid into his bankers' hands these bills, on his general account, for a particular purpose, viz., that the bankers might be enabled to provide for the payment of his acceptances in London. They were to be dealt with as the bankers thought fit to deal with them; to be nego-

tiated if they thought fit; to be discounted *at Liverpool if they pleased, or remitted to whom they pleased, and were necessarily [*160] to be converted into money, in order to be means effectual to the purpose of the deposit. Forbes and Gregory were parties capable of requiring a property in these bills, as capable as any third party; and must, therefore, be considered as third parties, with whom these bills had been negotiated. Therefore the case belongs to the second class of cases mentioned above, and Bolton could not recover against the assignees, who stood in the same position as Forbes and Gregory themselves.(s)

The following is a case of the deposit of a bill of exchange with bankers, by a person who was not a customer or person having an account with them.

A. deposits with bankers, at Sheffield, a bill of exchange, dated Madras, October 19, 1842, drawn upon Fletcher & Co., London, payable at thirty days' sight, which had been remitted to A., indorsed to his order. On the 12th December, 1842, A. inquired at the bank, at Sheffield, how he was to procure payment of the bill, and was informed by a clerk that the bill must be sent up to London, and remain there till it was paid. The clerk told A. to indorse the bill, and call again on 16th January, 1843, at the bank, when he might expect to receive the amount of the bill. The bank made no advance on the bill, but indorsed it especially to their London agents, in whose hands it was when they (the Sheffield bankers) became bankrupt, the fiat issuing on 16th January, 1843. The amount of the bill was received, by the London agents, on the 18th of that month, and was placed by them to the bankrupts' credit. On these facts the decision was, that the proceeds of the bill, after satisfying the lien of the London bankers, for any balance that might be due to them from the Sheffield bank, must be paid to A.; and if there were other depositors of bills, under similar circumstances, according to the rule in bankruptcy, the proceeds *of all the bills were to be distributed rateably among them, without any preference of one [*161] over the other.(t)

Relation of Banker and Country Correspondent.—Having thus discussed the relations, rights, and liabilities, of customer and banker, depositing bills with the latter and having touched upon a case, of the same kind, between a banker and a stranger; it remains to notice what are the relations, in similar circumstances, when dealings between the banker in the country, and his London correspondents, are added to the former simple relation of banker and customer. Now here, notwithstanding the general rule, that indorsed bills of exchange, deposited by the customer with his banker, are at the absolute disposal of the banker, and though the customer, on the bankruptcy of the banker, may recover in specie such of them as remain in the banker's hands, subject to the banker's lien in respect of advances, though he cannot follow the proceeds if they have been converted, yet this absolute property, of the banker, in the bills, may be qualified by circumstances.

(s) Bolton v. Puller, 1 B. & P. 539.

(t) Ex parte Froggatt, 3 M. D. & D. G. 322.

Thus, if a customer deposits indorsed bills with his country banker, to obtain payment on them, and the banker remits them to the London bank, who are his correspondents, to receive and pay bills, and as such agents have an allowance from him for so doing, and then the London bank becomes bankrupt, with the bills remaining undue in his hands; the assignees, upon receiving the proceeds of the bills, must pay them over to the country bank, subject to the lien of the London bankers, for anything remaining due from the country bank to them upon the contract between them; the London bankers being the paid agents of the country bank, for this purpose, of getting bills paid, and remitting the proceeds, and their power over the bills being limited to that purpose.

[*162] The same would be the case if the London banker, in the *annual account between him and his correspondent in the country, there being no proof of agency, had entered the bills as the property of the correspondent. In the former case, he would be considered as the factor of the country banker; in the latter, there is raised an express declaration of trust.(u)

Such, then, are the relations of country banker and correspondent, in case of the bankruptcy of the London correspondent. The result to the customer remains to be inquired into.

Now, it manifestly would be unjust, that the customer should be affected, by the bankruptcy of an agent, whom he has no voice in selecting, or by the state of the accounts between his banker and that agent; therefore, although the country banker receives the proceeds of the bills, *minus* the sum requisite to satisfy the London banker's lien for advances (if any,) and to indemnify the estate against acceptances or other engagements, which the London banker is under at the time of the bankruptcy, on account of the country bank, a sum equal to the whole amount of the proceeds of the bills must be paid by the country banker to the customer, (subject of course to the state of the customer's account;) for so only can his contract with, or duty to his customer, be performed.

So, in another case, where bills were remitted by a country bank to their correspondents in London, and stood, at the bankruptcy of the latter, entered short, not being then due, it was ordered, on petition of the country bank, that the bills should be delivered up to them by the assignees. The country bankers, in this instance, were not creditors of the London bankers when this petition was first presented, the cash balance being against them, but had since become so, turning the balance in their favour, by taking up the acceptances *given by the [*163] London house on their account.(x) The country bankers must have accounted to the customer, who deposited the bills with them, for the entire proceeds of them.

The following is a case of bills deposited by country bankers with their London bankers, on which the London bankers had a lien, and on which they were, therefore, held entitled to recover against the acceptor, (who

(u) Ex parte Pease, 1 Rose, 232; Ex parte Wakefield Bank, id. 243; see per Bayley, J., 2 B. & C. 429, 430.

(x) Ex parte Rowton, 1 Rose, 15; so Ex parte Buchanan, 1 Rose, 280; Ex parte Burton Bank, 2 id. 162.

stood in the character of surety for the country bank,) by virtue of the lien.

A banking house at Abingdon, being indebted to their London correspondents, are urged by them to send them up any bills they could procure. Accordingly they sent up two bills *for account*, which had been accepted by A. *for their accommodation*, and which became due respectively 19th March and 19th April, 1814, each of them being dated 13th December, 1813. The balance of the cash account, on each of the two first-mentioned dates, was considerably in favour of the country bankers. There were also periods subsequent to those dates, when the general account was in favour of the Abingdon bankers, but they afterwards failed, being, at that time, indebted to the London bankers, in a sum exceeding the principal and interest of the bills. The court at Nisi Prius, held the meaning of the expression "for account," to be *for the then floating account*; and it was remarked, "There was a period when the lien, on the bills, of the London bankers, ceased to attach, and when the bills might have been redeemed; but they were not reclaimed, and by allowing them to remain, in the hands of the London bankers, their lien reverted when, upon fresh advances made, the balance turned in favour of the London bankers." The action was brought by the London bankers against the acceptor, in virtue of their lien, and by way of enforcing and realizing it; and there having been a verdict ^{*in} [164] their favour, the court in banc, confirmed the verdict.(y)

The following is a case, which may fitly have a place here, in connection with the subjects above discussed, and with the last case. A. accepts four bills for the accommodation of B. B. indorses, and deposits them with his bankers, as a collateral security for his floating balance with them. B. becomes bankrupt, when the bankers proved, for a balance greatly exceeding the amount of the bills, exhibiting in their proof these four bills, among others, as securities, then held by them, and they afterwards received a dividend, of two shillings in the pound, on the amount of their proof. The bills were subsequently paid in full by A.: and it was held, that the bankers were bound to refund to A. the dividend of two shillings on the amount of the bills.(z)

The decision on the following facts, illustrates the relation of country banker and London correspondent, when the former deposits with the latter, a security, by way of *pledge*.

A customer gives his promissory note to his bankers, to secure repayment of advances. They become bankrupt, but, at that time, the customer holds bank notes of their bank to a greater amount than his promissory note, which, he had all along reason to believe, was still in the possession of the banker. In fact they had deposited it, by way of pledge, with their London correspondents. The London bankers enforce the payment of it from the customer of the country bank, the maker of the note; but the securities, in the hands of the London bank, were altogether more than sufficient to cover what was due to them from the bankrupts, and the surplus is returned to the assignees.

(y) Atwood v. Crowdie, 1 Stark. N. Pri. R. 483.

(z) Ex parte Holmes, 4 Deac. 82.

Held, that as the customer might have set off the notes he held against the bill in the hands of the bankrupts, he *was entitled to recover [*165] its amount from the assignees. The promissory note was payable on demand, with interest. The case is singular in its circumstances. It is obvious, that the customer, thinking that his promissory note was still in the hands of the bank, and therefore taking their notes, in the way of business, which he might not have continued to do, if he had known that they had parted with his promissory note, was put in a different situation, by their conduct. In a certain sense, too, the property in the promissory note had never left the bankrupts; they had only parted with the possession of it by way of pledge; then the question would be, whether the case did not come strictly within the terms of the class of mutual credit in stat. 6 Geo. IV. c. 16, s. 50, (now replaced by 12 & 13 Viet. c. 106, s. 171,) though the ultimate decision did not depend wholly on that question.(a)

Bills deposited by Strangers.—Several of the examples, cited above, have been cases where short bills have been deposited by customers; it being the law, as above stated, that bills are considered short, not merely from the fact of their being entered so, but from a consideration of the habits of dealing between the parties, and all the circumstances.

The following is an instance of a decision, upon facts somewhat different; where, viz., the bills were not short bills, and the party depositing was not a customer. A person deposits with bankers two bills, (one for 600*l.*, and the other for 400*l.*), indorsed by him; it being agreed that he should draw for the amount of 1,000*l.*, the bankers refusing to discount them; he, in fact, only draws to the amount of 65*l.*, and the bankers employ a broker to discount the bills; and then become bankrupt, in less than three weeks, after the bills had been deposited with them. It was not the usage of the bank to treat any bills paid in, by a [*166] customer, as short bills; but to consider all those paid in by *any one, as the property of the bank, and to be paid in on the customer's general account; and in keeping their accounts, they had not, like many other bankers, a cash column and a bill column, in their books, but it was their practice to blend both bills and cash; these were entered as bills. There was no cash balance, in favour of the person who paid in these bills, at the time of the bankruptcy, and no evidence of any other banking account in his name, but *that* on the bills. It was part of the above agreement for his drawing, &c., that he was not to draw out the amount of the 400*l.* bill until the 600*l.* bill was paid. He was held to be entitled, on the bankruptcy, to the proceeds of the bills.(b)

Here, it is evident, the property in the bills had never passed from the depositor; he was led to consider that the bankers would not buy them; their discounting them afterwards was without his knowledge; he would have been entitled to the bills, if they had remained in specie, in the hands of the bankers.

East India Bills.—Hitherto the facts, in the various cases cited, have

(a) Ex parte Staddon, 3 M. D. & D. G. 256.

(b) Ex parte Edwards, 2 M. D. & D. G. 625.

arisen respecting ordinary bills of exchange; the following was the case, of a deposit of East India bills, for safe custody, &c.

On 6th July, 1836, A. B. deposits with her bankers at Carlisle, for safe custody, certain East India bills, specially indorsed by her, with instructions to receive the amount when due; the indorsement being made merely for the protection of the property. East India bills, in general, are negotiable in the market, like common bills of exchange, and would, therefore, in the ordinary course, be only deemed securities. The balance of A. B.'s account, exclusive of the amount of the bills, was then in her favour, and continued so up to the bankruptcy of the bankers. They charged discount on the bills, in their account with her, and she might *have drawn on them for the amount of them, it being [*167] the custom, of the bankers of Carlisle, to consider ordinary bills, so deposited, as cash. The *fiat* issued 23rd November, 1836. The bankers paid away the bills to a creditor, with whom the assignees afterwards settled an account, charging him with the amount of the bills, and receiving from him the balance due to the estate. Here the bankers acted in express violation of the directions under which the bills were deposited, and A. B. was held to be entitled to be reimbursed the whole amount of the bills from the assignees. It would not have made, it appears, any difference, if she had overdrawn her account. These East India bills were drawn (or signed by order of the Governor in Council of Bombay,) on the Court of Directors of the East India Company, and were on account of the principal of the Bengal Six per Cent. Remittable Loan of 1822 and 1823, payable 18th January, 1837, so that they never were intended, by the parties to them, to be considered in the light of common bills of exchange.(c)

The reason why it would not have made any difference, in this case, if the account had been overdrawn, at the time the bankers disposed of the bills, appears to be this:—Where bills, &c., are remitted to a person, for a specific purpose, he is bound to perform that purpose, or return the securities; if he receives the amount contrary to the directions of the remitter, he cannot apply it to the payment of his own debt; therefore, if the account of A. B. had been overdrawn, it would not have been an excuse for the bankers to say, they had sold or discounted the bills, or paid them away, and carried the amount to the customer's account, and applied it in reduction of her debt to them.(d)

**Bank Post Bills.*—So, if a person goes to his banker, and says, here are 1000*l.*, in Bank of England notes, get me a bank [*168] post bill for them; the banker cannot receive them silently, as though acquiescing in the object of the customer, and then set up his lien and apply them in reduction of the balance, against the customer, on his account.(e)

(c) Ex parte Bond, 1 M. D. & D. G. 10.

(d) Ex parte Brown, 3 Deac. 91, per Erskine, C. J., which case also recognizes the principle that bills remitted, clothed with a trust, are not within the reputed ownership clause, 6 Geo. IV. c. 16, s. 72, now replaced by 12 & 13 Vict. c. 106, s. 125; so 1 T. R. 623; 1 Sch. & L. 328.

(e) See observations by Ld. Lyndhurst, C., and Ld. Brougham, *Brandão v. Barnett*, 12 Cl. & F. 802.

Then, such expressions, used in the letters of remitters of bills or otherwise, as, that they expected the banker "to do the needful,"^(f) or "to cover us in due time,"^(g) do not enlarge the powers of the banker, or constitute a special contract, authorizing him to deal with the bills as his own, or relieve him from the obligation of retaining the bills till due, if remitted to receive payment of them.

So where a bank post bill had been remitted, by a customer to his bankers, with a letter desiring them to place it to his credit, and to send him a receipt, and credit had been given him, in his account, for the amount of the bill, and a receipt given him, in the same way, as if it had been a cash payment; the bank post bill, as is mostly the case for the sake of security, when bills are sent into the country, was unaccepted. Now, in such case, if the customer had drawn a cheque upon the bankers for a sum exceeding his balance, supposing the bank post bill, for which he had credit in the bankers' books, were not reckoned, and the bankers had refused to honour the cheque in respect of that deficiency, it seems probable that an action, such as it has been already shown a customer, who has an undoubted balance in his favour, may maintain in general, on refusal to pay his cheque, could not have been supported; for the bankers might have answered truly, that an unaccepted bill, though of [*169] the Bank of England, payable seven days after sight, is, *for many purposes, not equivalent to cash; and in fact, their duty had been performed by transmitting the paper to London, for acceptance, and raising the money upon it within a reasonable time. It was apparently, though with hesitation, concluded, therefore, that the bank post bill had never become vested, as property, in the bankers; in other words, it was never in the character of cash between these parties; the ordinary relation of banker and customer remaining between them not regulated or qualified, by any particular agreement, express, or to be inferred from circumstances or habits of dealing. The customer, therefore, was entitled to the proceeds as against the assignees.^(h)

Debentures.—So where debentures for tontine annuities were deposited with bankers, and their assignees claimed a lien on them, and one of the bankers had received the dividends upon the debentures; it was held, that the deposit was in the nature of a trust, and the debentures were not, therefore, in the order and disposition of the bankers at the time of their bankruptcy.⁽ⁱ⁾

Bankruptcy.—Reputed Ownership.—Mention has been made^(k) of the position that bills of exchange, remitted to a banker, clothed with a trust, do not pass to the assignees, upon the bankruptcy of the banker, as they would do if they were, in such case, within the doctrine of reputed ownership;^(l) but, nevertheless, in all other circumstances, bills

(f) Ex parte Smith, Buck. 355. (g) Jombart v. Woollett, 2 My. & C. 389.

(h) Ex parte Atkins, 3 M. D. & D. G. 103, 108. There is some doubt as to what is the precise character of bank post bills. In Forbes v. Marshall, 24 L. J. (N. S.) Ex. 305, 308, they were considered by Pollock, C. B., and Alderson, B., to be bills of exchange; by Martin, B., to be promissory notes; S. C., id. 309.

(i) Ex parte Douglas, 3 Dea. & C. 310.

(k) See sup. p. 142; Ex parte Brown, 3 Dea. 91.

(l) 6 Geo. IV. c. 16, s. 72; now replaced by 12 & 13 Vict. c. 106, s. 125.

of exchange, placed in the hands of a banker, will so pass. For instance, if A., *who has had no previous *dealings with a banker*, in the country, applies to him to give him a bill, on London, for three [*170] bills of exchange, of which the applicant is holder, and the banker does so, and the bill given by the banker is afterwards dishonoured, this transaction is a complete exchange of securities, and trover will not lie at the suit of A. for the three bills; and, even if the exchange had not been absolute and complete, the banker having become bankrupt, and the three bills having come to the hands of the assignees, must be considered as goods and chattels, in the order and disposition of the bankrupt, at the time of his bankruptcy, within the meaning of the bankrupt law. For the bills were indorsed to the bankers, who had the power of disposing of them, and, in like manner, A. had a similar power over the bill handed to him in exchange; and the former, being negotiable securities, and having remained in the hands of the bankrupts until the bankruptcy, seem necessarily to have been held within the doctrine. The case was held to be quite distinguishable from that of bills deposited by a customer clothed with a trust, for trust property is always considered not to be within the principle of the bankrupt law in this respect.(m)

But it is not only when bills of exchange or other securities are deposited, for a specific purpose, with bankers, that the property remains in the depositor; there is another class of cases, where money, paid into a bank, may, under certain circumstances, remain the property of the party paying in, and be, therefore, recoverable, on bankruptcy, from the assignees.

Thus, where a person had deposited, after banking hours, a large sum of money with the manager of a provincial bank, at the banking house, the manager knowing that the *bank was on the eve of stopping, though no resolution to that effect had been, in form, [*171] come to by the bankers, and he had placed the money in a place by itself, separate from the funds of the bank, and the bank never after that day opened for business; it was held, at *Nisi Prius*, by Lord Tenterden, C. J., that the depositor was entitled to recover from the assignees.(n)

So where it was the usage of a banking house, that money, paid in after banking hours, should be put into a separate place of deposit, and entered in a counter book, but not carried to the customer's account till the next day; and a customer paid in a 500*l.* Bank of England note after banking hours, and the banker, having before resolved not to reopen for business, placed the note in a separate place, and next morning stopped payment and became bankrupt, the customer recovered from the assignees, the bank note being held to remain his property.

It may be further observed, that the usage was for the customer to be considered to be entitled to draw upon money so paid in, at the opening of the bank, on the following morning. The "counter book" was a book

(m) *Hornblower v. Proud*, 2 B. & A. 327; see *Bryson v. Wylie*, 1 B. & P. 83, n.; and see instance of a somewhat like transaction, but *not* amounting to an exchange, where the result was different; *Parke v. Eliason*, 1 East, 544.

(n) *Threlfall v. Giles*, (Lancaster Summer Ass. 1822,) cited 2 M. & Rob. 492.

in which an entry was made of all moneys paid in to the bank, as the same was paid in, and was always resorted to, to ascertain whether money has been paid in by a customer, during the day, before a cheque of such customer was dishonoured. The bank note was not entered in any other book of the bank, nor was it in any way carried to the account of the customer, or entered in his pass book, and never was mixed with the assets of the house.^(o)

A sum of money, consisting partly of Bank of England notes and country bank notes, partly of cheques on country bankers, and partly of coin, was, after banking hours on a Saturday evening, placed in the hands of the manager of the bank, at the banking house, where [*172] he resided, and he gave a receipt, *with the words "to be accounted for on demand,"* for the same, dated as of the following Monday; they were not entered in any of the bank books by the manager, or in any way mixed with the bank moneys, but were placed, by the manager, in a bag, in which there was nothing else. The bank never opened again for business. The partners in it were afterwards made bankrupts: the money so deposited was held, in bankruptcy, to pass to the assignees.^(p) In this case, however, the manager was in the habit of receiving deposits after banking hours, and the customers, from whom the above-mentioned deposit was received, were in the habit of making deposits after the bank had closed, and such deposits had always been treated, by both parties, as if they had been regularly made. One of the partners had already resolved to commit an act of bankruptcy, and, on the same evening of Saturday, did commit an inchoate act, unknown to the other and remaining partner; the firm did not become bankrupt until the Monday.

If money be remitted to, or deposited with a banker, by a customer, for the special purpose of paying certain bills, accepted by the customer, and about to become due, and the bankers, without making any communication to the customer, dishonour the bills, the balance on the customer's account being against him at the time, and the customer afterwards become bankrupt, and his assignees bring an action against the bankers for the injury caused to the bankrupt by their conduct, and obtain a verdict for a sum equal to the amount due on the bills: it will be held, in bankruptcy, that they are entitled to retain this sum against the holders of the bills, who will, however, be allowed to prove.^(q)

*Before passing from the subject of remitting of bills, &c., it [*173] may be desirable to revert to the subject of the relations, in this respect, between bankers and their correspondents.

Relation of Banker and Correspondent.—Various occasions occur for observing the frequency, in questions of banking law, with which the principle is applicable by which the incidence of a loss is determinable, when the question is, which of two parties, who are both equally inno-

(o) Sadler v. Belcher, 2 M. & Rob. 489.

(p) Ex parte Clutton, 1 Foul. R. 167; see Sadler v. Belcher, 2 M. & Rob. 489, the difference between the two cases is, that, in the latter, the determination to commit an act of bankruptcy had been taken, by all the partners, before the money was paid in; moreover, no receipt was given.

(q) Ex parte Sparkes, 1 Foul. 51.

cent of fraud, or crime, in the transaction, must bear a loss. This principle is particularly deserving of attention in questions arising on dealings of a customer with his bankers, who are obliged, in order to complete the intended transaction, to employ the agency of their correspondents—other banking houses, carrying on business at a distance.

Thus, if A. employs his bankers to perform some duty for him, which can only be brought to a conclusion in some place at a distance, whether in this country or in foreign parts, so that it becomes necessary that his bankers should employ the agency of persons acting in that place, and a loss ensues from the conduct of the agents, whether direct or intermediate, who are so employed, and the question arises whether A. or the bankers are to bear that loss, in all such cases it is the bankers who must suffer; for, of the two, they are the parties whose conduct has led to the loss; for it was they who chose the agents, or who chose the correspondents who selected the actual agents; it is their act, therefore, which has led to the occurrences which have caused the loss, and that loss, as between themselves and A., they must be liable for; in other words, A. has a right of action against them, and will, in a court of law, be compensated for the injury he has sustained. The bankers, however, will have a right of recourse against their correspondent, by whose laches or default, either primarily or through the default of any one whom the latter may have intrusted with the business, the bankers have incurred the loss.

*The following case well illustrates this position:—

A customer of a bank sends orders to his bankers to obtain, [*174] for him, payment of a bill of exchange, drawn by him on a person in Calcutta; the bankers accept the employment, and write him word that they had done so, promising to credit him for the amount of the bill when received. In the usual course, they transmit the bill to their correspondents in London, by whom it is forwarded to the house of A., in Calcutta, to get payment; it is paid into A.'s, immediately after which they fail. The customer, having been advised, by his banker, that the bill was paid, they were held to be his agents to obtain payment, and it was also decided that *ipso facto*, upon payment being made, they became liable to him for the amount received; and that any loss which might arise from the conduct of the bankers' sub-agents, between whom and himself no privity was established, must fall on the bankers.^(r) And the case was said not to be distinguishable from the case of a customer, of a bank in London, sending them a bill, or cheque, with orders to get payment, and their clearing-house clerk, instead of returning with the balance, absconds; in which case the bankers would clearly be liable, to the customer, for the amount of the bill.^(s)

Also, the state of the accounts, between the customer's bankers, and any of the correspondents they may employ in the transaction, can make no difference.

Hence, in all cases where a customer desires his bankers to obtain

(^r) *Mackersy v. Ramsay*, 9 Cl. & F. 818.

(^s) *Per Ld. Lyndhurst, C.*, id. 848.

payment of a bill for him, and they do not refuse, or if a stranger makes the same request, and they agree to perform it, they are liable for the amount of the bill, whether, after remitting it to their correspondents, to get the payment, its amount is returned to them or not, provided, in the latter case, the cause is the default of their correspondents.

[*175] *Another transaction, between a bank in the country and its town correspondent, may here be mentioned, though no definite result was arrived at.

A bill of exchange, for 400*l.*, had been drawn by Cooke and Co., bankers at Sunderland, on Bruce and Co., bankers in London, (but had not been accepted by them,) payable at forty days, in favour of Herring, and by him it was indorsed generally to Burn, in satisfaction of a debt, and by him indorsed, before it was due, to Cooke and Co., in exchange for a draft for 1,080*l.*, being the amount of that bill and certain others, Burn being to a much larger amount indebted to them. Cooke and Co., instead of cancelling the bill for 400*l.*, remitted it, on the day of its date, but not indorsed by them, to Bruce and Co., their correspondents, it being their usage so to remit bills for the purpose of being written off. This bill, however, was not remitted direct in the usual manner, but sent, under cover, to one Alexander, a bill broker, through the medium of Simpson, a partner in the house of Bruce and Co. (the object being to save postage, as Simpson was an M. P.) Alexander was directed, by Cooke and Co., to get the bill discounted, and pay the proceeds to Bruce and Co., for their account. At that time, the sheriff was in possession of the shop and all the property of Bruce and Co., under an extent against them, and on the arrival there of the parcel containing the letter (which was not sealed) and the bill, the officer opened the parcel, and took possession of the enclosure.

On these facts, it was doubted whether the banking house of Bruce and Co., had such a property as would support the affirmative of an issue, that Burn was indebted to the banking house in the amount of the bill.(*t*)

Another consideration is to be mentioned, for the purpose of showing, that whatever may at first sight appear to be the case, there is, in truth, [*176] when the subject is correctly *investigated, no hardship upon the banker implied in the operation of the principle above mentioned, in such circumstances as those of the last case. The banker voluntarily assumes a character, in which he holds himself out to the world as ready to transact certain well-known classes of monetary business, for all who choose to employ him, in consideration of reward. In that character he must be taken to have calculated the risk of losses which he may incur, in course of his business, from the imprudence, the carelessness, the defaults, or the misfortunes of those whom necessarily, from the nature of that business, he must often employ in the conduct of it, and with whose characters, capacities, and positions in life, he often cannot necessarily have any but the slightest, and most imperfect means

(*t*) *Rex v. Burn*, 5 Price, 173; see *Beck v. Robley*, 1 H. B. 89, note; and on this case see *Jones v. Broadhurst*, 9 C. B. 186.

of acquaintance. He must be taken to have calculated his risks, and calculated also the rate of reward, at which he will encounter those risks accordingly. If he has not done so, and if he fails to require such an amount of reward in his transaction of the business of his employers, as is in fair proportion to the degree of risk with which the business is attended, he fails to observe that degree of vigilance, in providing for his own interests, which the law demands, before it lends its aid to a sufferer. The banker is not a gratuitous agent; he cannot allege to his employer;—I reap no advantage from the performance of your business; I have performed it with the same degree of zeal and caution, that I should have exerted in my own; and, therefore, I cannot be responsible for the results; but being paid, he must be content to take the known risks, and must abide by the results, whatever they may be.

The following is a case, equally consonant with justice :—

A customer of a bank accepts a bill, payable at the bank; the bill was drawn in favour of one A., and was casually lost by him. The banker has notice of the loss, but, nevertheless, afterwards discounts the bill, and afterwards debits *the customer with the amount of the bill, [*177] writes a discharge on it, and hands it to the customer as his voucher. These acts are several acts of conversion by the banker, and A. may recover in trover, without any previous demand against the banker.^(u)

Stock, &c., of Customers—Bankruptcy.—Cases of fraudulent disposal, by bankers, of stock, &c., belonging to customers, sometimes occur, in which they have attempted to repair the injury done to the customers, by substituting securities of their own, in place of those with which they have improperly dealt, but such attempts are, for the most part, wholly ineffectual, in case of bankruptcy, as against the assignees.

Thus, where a customer of a bank was owner of 16,000*l.* Navy Five per Cent. Stock, which stood in the name of one of the partners of the bank; and the partner sold out the whole of the stock, and applied the proceeds to the purposes of the banking house; at the same time enclosing in an envelope certain bonds belonging to the house, together with a memorandum to this effect—Borrowed and received of J. Balfour, Esq., (the customer,) 16,000*l.* Navy Five per Cents., which we promise to replace; and we have deposited with him, as collateral securities, these bonds of the Earl of Oxford and Mortimer, and others, which we promise to assign when required,—and sealing up the bonds, and writing on the envelope, “The property of J. Balfour, Esq.” This packet was deposited in an iron chest, among securities belonging to other customers. In the evening of the day before the bank stopped payment, this packet was sent to the customer, who then first learnt that the stock had been sold. But it was held, that as the possession of the bonds had never been out of the bankers till the very eve of the bankruptcy, when the bankrupts could not give a *preference, the customer had no lien on the [*178] bonds, but must give them up to the assignees.^(x)

^(u) Lovell v. Martin, 4 Taunt. 799.

^(x) Wilson v. Balfour, 2 Campb. 580; see Adams v. Claxton, 6 Ves. 230, 231, per Sir W. Grant, M. R.

Title to Goods, &c.—Generally, as to the deposit of goods by way of security, the banker is bound, at common law, to take care that the person depositing is entitled to the goods; otherwise the banker may at any time be called upon to surrender the goods, or the value of them, to their real owner;(y) and a person, though he come into possession of goods properly, nevertheless does not always take or retain the right to dispose of them; thus, if a person be intrusted with jewels in a bag sealed, to be kept safely for the use of the real owner, he becomes possessor mala fide, by breaking the seals; he has no right to the property, and he cannot transfer to the bankers more right than he has himself.

Deposits of securities against Advances, &c.—Having observed what is the effect of depositing securities with a banker for safe custody, or for some specific purpose, not giving any property in them to the bankers, in cases which, for the most part, have arisen, where the customer's account with the bank has been in his favour, let us proceed to investigate the effect of depositing securities, &c., when the balance is against him, and when the object of the deposit is to save harmless the bankers against their advances to the customer.

The following case may, perhaps, be fitly selected for leading notice, as being a transaction between two banks, and as containing an important principle for ascertaining when such securities are to be held to be in the order and disposition of bankers, in the event of their bankruptcy.

[*179] **Policies of Insurance.*—A., being a banker at Manchester, had become mortgagee of certain policies of life assurance, the various insurance offices interested having notice of the fact. He applies to B., a banker at Wirksworth, for a loan of money, offering to deposit them and other securities, &c. This was agreed to, and the deposit was made, &c., but no notice is given to any of the several insurance offices interested. In such case these securities, notwithstanding they were in fact handed over to B., remain, on the bankruptcy of A., in the order and disposition of A.; the title to them does not pass to B., no notice having been given to the insurance offices of the transfer, and A. continuing to pay the premiums on the policies for six months after that transfer, so as to hold himself out as owner, (which was part of the circumstances.)

The general principle involved is now well established, viz., when a debt, due to a trader, is assigned by him, it remains, notwithstanding such assignment, in his order and disposition, in the event of bankruptcy, if nothing more is done to give publicity to the assignment, than the mere delivery of the instrument creating the debt.(z)

With respect to the question, to whom shall notice be given? The general rule is this—No notice of assignment of a debt can be necessary to any party, from whom the trader is not to receive payment, or who

(y) *Hartop v. Hoare*, 3 Atk. 44.

(z) *Ex parte Armstrong*, 3 M. D. & D. G. 143; *Ex parte Tennyson*, Mont. & Bli. 67; *Gordon v. East India Co.*, 7 T. R. 237; *Ex parte Arkwright*, 3 M. D. & D. G. 143; see *Ex parte Barnett*, De G. Bank. R. 194; *Dean v. James*, 1 A. & E. 809.

does not hold any property at the order or disposition of the trader.^(a)

It does not appear to be intended to make any distinction as to the matter of notice of assignment, between persons acting for themselves, and persons acting as executors and trustees: if, as has been stated authoritatively,^(b) the reason *why notice to one trustee has been held sufficient, is because nothing less than inquiry of all the [*180] trustees would satisfy a prudent inquirer; that reason seems to apply equally, or, perhaps, it is more accurate to say, it applies much more strongly, in the case of executors, where each may give acquittances, and pay and receive, on account of the estate, and where, although it is often found that one only takes an active part, yet there is nothing to prevent any of the others, at any time, effectually interfering in the management of the estate.

Further, it seems, that if notice had been given to one trustee, who dies without having communicated it to the others, and no new notice had been given to the surviving trustees, before the bankruptcy of the assignor, or depositor, it seems probable that the property would be held to be within the order and disposition of the bankrupt, for in such case, inquiry of *all* the trustees would not have led the inquirer to the knowledge of the assignment.^(c)

In the above-mentioned Manchester case (as it has been in other cases,) it was contended, in respect of one of the policies deposited, that being made in the Equitable Assurance Office—a company, which is a mutual assurance company, where each person insuring is a shareholder, and member of the company, and therefore a partner, a formal notice of deposit was not necessary in such case, because notice to one partner was notice to all the company; but the vice-chancellor nevertheless held himself bound, under all the circumstances of the case as stated, to make no distinction between the policy in this company and the others.^(d)

It is to be remembered, however, that on a deposit of a policy of assurance, by way of equitable mortgage, the *onus* *does not lie [*181] on the mortgagee to show, that notice of the deposit was given to the office, before the bankruptcy, but with the assignees to show, that it was not;^(e) and where a bankrupt, being one of the directors of a life assurance office, deposits a policy, made in that office, with his bankers, one of the bankers being also one of the auditors of the assurance office, it was considered that, in these facts, there was sufficient

(a) *Gardner v. Lachlan*, 4 My. & C. 132, per *Ld. Cottenham*, C. See further as to notice on assignment of debts, *Ex parte Burton*, 1 Gly. & J. 207; *Ex parte Osborne*, *id.* 207.

(b) Per *Wigram*, V. C., 1 Hare, 96, 97.

(c) Per *Wigram*, V. C., 1 Hare, 97, and see the remarks there; and per *Sir E. Sugden*, C., *rel.*, 1 Connor & L. 562, that the same principle holds in case of death of executor.

(d) *Ex parte Arkwright*, 3 M. D. & De G. 143; see *Ex parte Wood*, 3 M. D. & De G. 315; *Re Styant*, 2 M. D. & De G. 219, 213; *Thompson v. Spieries*, 13 Sim. 469; *Ex parte Wilkinson*, *id.* 475.

(e) *Ex parte Stevens*, 4 Dea. & Ch. 117; *Edwards v. Scott*, 1 M. & Gra. 962; *Tibbits v. George*, 5 A. & E. 107; see *Ex parte Smith*, 2 M. D. & De G. 219; *Ex parte Majoribanks*, De G., Bank. R. 477. What not sufficient notice; *Ex parte Carbis*, 4 Dea. & Ch. 354.

notice, to the office, of the transfer of the bankrupt's interest in the policy, to prevent the assignees claiming the policy, as being in the reputed ownership of the bankrupt, at the time of the bankruptcy.^(f) This decision, however, has been disapproved by Sir E. Sugden, C.,^(g) and would hardly be followed at the present day.

Policies of insurance against loss or damage by fire are not, *in their nature*, assignable, nor can the interest in them be transferred without the express consent of the office.^(h)

There is no objection to depositing, as a valid security, a policy of marine insurance, if the proper steps are taken.

If a manufacturer, being indebted to his bankers, assigns to them his leasehold premises, with all his stock in trade, utensils, and effects, and also a policy of insurance, as security for advances made, or to be made, with a power of sale, and a proviso that he shall retain possession until default, but the assignment does not comprise all the trader's property; the execution of this deed, being bona fide, does not constitute an act of bankruptcy.⁽ⁱ⁾

[*182] *When a mortgagee of a policy of life assurance deposits it with his bankers by way of sub-mortgage, and gives notice of the sub-mortgage to the insurance office, it is not necessary that he should give notice also to the original mortgagor, in order to take the securities out of the principle of reputed ownership, on the bankruptcy of the depositor.^(k)

If a trader deposits a policy of insurance with his bankers to secure a floating balance; signs a memorandum of the objects of the deposit, and notice is given of it to the insurance office, and afterwards he takes a partner, and opens a fresh account, with the bank, in the name of the firm, and the policy remains in the bank, and is treated as a security for the floating balance due from the firm, but of this change in the object of the security, no memorandum is signed, nor any notice given to the office, the policy is nevertheless not in the order and disposition of the depositor on his subsequent bankruptcy, because the prior notice, rendering it impossible to deal with the policy, without making inquiries, effectually prevents that result.^(l)

A life policy is deposited by the bankrupt before an act of bankruptcy,

(f) Ex parte Waithman, 4 Dea. & Ch. 412; Ex parte Watkins, 2 M. & A. 348.

(g) Ex parte Henessey, 1 Connor & L. R. 562. Generally knowledge is sufficient notice, Tibbits v. George, 5 A. & E. 107; Smith v. Smith, 2 Cro. & M. 231.

(h) Lynch v. Dalzell, 4 Bro. P. C. 431; Saddlers' Company v. Badcock, 2 Atk. 557.

(i) Carr v. Burdiss, 1 C. M. & R. 443. See the principle of such assignments discussed, Graham v. Chapman, 21 L. J., C. B. 173; Young v. Waud, 22 L. J., Exch. 30.

(k) Ex parte Barnett, De G. Bank. R. 194. See there the form of memorandum in such case. At law it has been ruled that assignees of a bankrupt cannot recover in trover a policy of insurance effected by the bankrupt and deposited as above, although no notice had been given to the office. Gibson v. Overbury, 7 M. & W. 555; (see per Knight Bruce, V. C., in Ex parte Price, 3 M. D. & D. G. 591;) but the Court of Exchequer, in Gibson v. Overbury, fully admitted the authority of the cases cited above on this subject, as regards the doctrine of notice; and they held that the assignees might recover the debt due upon the policy from the office. So Belcher v. Campbell, 8 Q. B. 12.

notice of the deposit not being given till after such act, and not till seven years after the deposit (but before fiat,) but it not appearing that the depositor knew of such act, the notice was held sufficient to give the depositor a good title, as against the assignees, inasmuch as the whole was bona fide, and the transaction was fully completed before the fiat. That question arose under 2 & 3 Vict. c. 29.(l)

*In general, it is a rule, with respect to agreements for equitable mortgages, that the circumstances must be such as to relieve [*183] from all suspicion of collusion or fraud, otherwise a sale of the property will not be decreed.(m)

The notice of deposit, given to an insurance company, need not be in writing.(n)

Where no bankruptcy intervenes, the necessity does not arise, of notice of the transfer or assignment being given to the office, but the mere deposit of the policy, it being the intention, at the time, to give the bankers a lien, will suffice to constitute them equitable mortgagees, although there be no memorandum of deposit, and even although there be a memorandum of deposit relating to other policies of insurance, and deposited at the time, but not comprising those in question.(o)

As regards the proper person to give notice of transfer to, in order to bind an insurance company, the following may be laid down.

All risks as to whether notice has been properly given to the insurance company will be avoided, in all probability, by acting on the suggested rule,(p) *to give notice to the officer representing the company*, which, in case of an incorporated company, would be the head or chairman, or the directors, or the secretary, according to the terms of the charter, or incorporating statute; in case of a joint-stock company, would be the public officer of the company, or secretary, or agent of the company, according to the terms of the deed of settlement, and to the usual practice of the company.

In a case where it was proved that the company had authorized [*184] *their agents to receive notices of assignments of policies, and agreed that notices to those agents should be as valid as if served on the company: it was held, that knowledge of an assignment obtained by one of their agents, not in the shape of a communication to the company, but as attorney for the assignor and assignee, was sufficient.(q) Where notice is necessary, it makes no difference, that the particular company have a rule dispensing with such notice.(r)

(l) In re Styan, 2 M. D. & D. G. 219; see Young v. Hope, 2 Ex. 105; Re Pritchard, 1 Fonbl. R. 238.

(m) Ex parte Nunn, 1 Deac. 611.

(n) Re Raikes, 4 Dea. & C. 412; Ex parte Tanner, 1 Bank. and Insolv. Rep. 156; Ferris v. Mullins, 2 De G. & Sm. 386.

(o) See Ferris v. Mullins, 2 De G. & Sm. 378.

(p) Per Sir E. Sugden, C., Ir., Ex parte Hennessey, 1 Connor & L. 563; S. C., 2 Dru. & War. 555. If a bankrupt is assignee of a chose in action, and does not give notice of the assignment, his assignee must. Ex parte Wood, 3 M. D. & D. G. 315.

(q) Gale v. Lewis, 9 Q. B. 730; see Wing v. Harvey, 18 Jur. 394; S. C., 23 L. J. (N. S.) Ch. 511; S. C., 5 De G. M. & G. 252.

(r) Ex parte Patch, 7 Jur. 820.

It is very material for bankers to ascertain, that the deposit of a policy of insurance is made, in all respects, in a proper and unobjectionable manner; if it is not, the deposit may be ineffectual, as a security; at least, without an application to the Court of Chancery.

Thus, a certain banking house advances to A. 250*l.*, on two promissory notes, and the security of an insurance on his own life for 1,000*l.*, which he deposited with them. Now, this policy had already been assigned by deed to a third person, B., who had negligently left the instrument in the hands of A. Then B. dies, and his executor pays the premiums, as B. had been in the habit of doing, up to the death of A., when the executor brings detinue against the bankers for the policy, and recovers; the bankers not being able to make out their allegation, that B. had fraudulently intended to leave, in the hands of A., the policy, in order that A. might have the means of borrowing money of some one, and to cheat some one, by so doing.^(s) Notice of the assignment had been duly given to the insurance office, but it seems, that, in the usual course of business, the insurance office would have refused to answer any inquiries that the bankers might have made on this point. The decision was at *Nisi Prius*, but possibly in equity the bankers would be relieved.

[*185] *When the customer, by indenture, assigned to the bankers a number of shares in a life assurance company, then standing, in the name of the customer, in the books of the company, subject to redemption, on payment of a sum therein mentioned, and with a power of sale and covenant for further assurance. The bankers gave the usual notice, to the company, of this indenture and the transfer; an entry thereof was made in the company's ledger, the indenture of assignment having been prepared in the office of a firm, who were the company's solicitors. The company afterwards refused to recognize this transfer, because it had not been made with the formalities required in the deed of settlement of the company, of which the assignor was a director, and they never removed the name of the assignor from their books, in which these shares still stood, in his name, when he became bankrupt. It was held, that the notice was sufficient, and that the circumstances sufficiently showed the bankrupt not to be the reputed owner of the shares, at the time of the bankruptcy.^(t)

So, where a director of an insurance company executed an assignment of his shares, as a security, to a person who gave notice to the insurance company, though not until some time after the assignment, it was held, that the notice having been given before the act of bankruptcy, the shares were not in the order and disposition of the bankrupt, within the Bankrupt Act (12 & 13 Vict. c. 106, s. 125,) and that the assignee of them had a good equitable mortgage.^(u)

(s) *Neale v. Molineux*, 2 Car. & K. 672.

(t) *Ex parte Masterman*, 2 M. & A. 209; that there was in this case no collusion or fraud, and no statutory enactment, distinguishes it from *Ex parte Lancaster Canal Company*, 1 Deac. & Ch. 411; see case of shares in a gas company, *Ex parte Spencer*, 3 M. & A. 697.

(u) *Ex parte Littledale*, 24 L. J. (N. S.) Bankr. 9, (one of the Lords Justices doubting;) see *Cumming v. Prescott*, 2 Y. & Col. Ex. Eq. R. 488. As to what has been considered sufficient notice, *Ex parte Stright*, 2 Dea. & C. 314; *Smith v.*

*The obvious mode to avoid all questions is, for the bankers, in all cases of deposits of policies, or shares, to take care to give [*186] notice immediately, and to see, in the latter case, in addition, that the proper transfer is completed, according to the terms of the statute, or deed of settlement, under which the company is constituted.

Shares in a banking company were, by the deed of settlement, to be subject to a lien on behalf of the company, when the proprietor of them became debtor to the company; in such case (the proviso being indorsed on the certificates of the shares,) the latter are not in the order and disposition of the proprietor, at the time of his bankruptcy.(x)

In the case of an assignment of a policy of insurance, it is not essential that the assignment should contain a declaration, that the receipts of the bankers shall be sufficient discharges to the insurance company; for that they shall be so, is necessarily implied, from the nature of the transaction.(y) On the other hand, in the case of a mere equitable mortgage, by deposit of the policy, although the assignees of a bankrupt depositor cannot recover back the policy, from the bankers, by means of an action at law, yet if they have claimed the debt in time, they may, on its being paid to them by the company, give a valid discharge to the company;(z) and thus the bankers would be left without remedy, and so would find their security worthless.

It is hardly necessary to observe, that in either case, whether of bankruptcy or insolvency, the residue (if any) of the sum received by the bankers, after the debt is satisfied, *must be paid over to the assignees, or provisional assignee, and this will be enforced in [*187] equity.

Circumstances, sometimes, arise out of assignments, to bankers, of policies of life insurance, in which difficult questions as to interpleader have to be settled. Now, it would lead too deeply into technicalities, to pursue this subject from the beginning; we will, therefore, state the principal facts, and the essence of the judgment in the last case, which has occurred previously to the publication of this work, leaving it to the reader to refer to the reports of the case itself, which will put him on the path of the prior decisions relative to the matter, and so enable him to discover whatever has been decided on the subject.

A. insured B.'s life, in the Atlas Assurance Company, for 3,000*l.*, payable to A. on the death of B. Immediately afterwards, A. assigned the policy to his bankers, as security for a loan or advance (which was

Smith, 2 Cro. & M. 231; Meux v. Bell, 1 Hare, 73; Matthews v. Gabb, 15 Sim. 51; West v. Reid, 2 Hare, 249. What sufficient notice of deposit of railway shares, Ex parte Harrison, 3 Deac. 185; Ex parte Nutting, 2 M. D. & De G. 302; 8 & 9 Vict. c. 16, s. 18; Ex parte Richardson, 3 Deac. 496.

(x) Ex parte Plant, 4 Deac. & C. 164.

(y) Per Ld. Cranworth, C., Dessborough v. Harris, 3 Eq. R. 1058. There was, in that case, the usual power of attorney enabling the mortgagee to give receipts; S. C., id. 1061; and see Glynn v. Locke, 3 Dru. & War. 11; Otley v. Gray, 16 L. J. (N. S.) Ch. 512.

(z) Gibson v. Overbury, 7 M. & W. 562. An assignment of a policy of insurance as security for a debt, with a proviso for redemption on payment, is a mortgage within 55 Geo. III. c. 184; Sched. pt. 1, and therefore requires an ad valorem stamp. Caldwell v. Dawson, 5 Exch. 1.

also secured by a mortgage of real property.) Notice was given to the company of the assignment. A., subsequently, took the benefit of the Insolvent Act, and all his property vested in the provisional assignee. Then B. dies, and the company, some time afterwards, file a bill of interpleader in equity, alleging that A., and the provisional assignee, disputed the right of the bankers to receive the 3,000*l.*, and that the bankers had commenced an action against the company, in the name of A. It appeared that the provisional assignee refused his consent to the bankers receiving the money, refusing also to release the company, but otherwise offered no opposition, not disputing their right to the policy, and the moneys payable thereunder, but merely leaving them to make out their claim. Lord Cranworth, C., decided the company to have no right to call upon A., and the bankers, or the provisional assignee, to interplead,^(a) and dismissed the bill, with costs, as against the bankers and the provisional assignee. A strong opinion was also expressed, that A. had no [*188] beneficial interest *in the question, all his beneficial right of redemption having passed to the provisional assignee.

The result of the above statements, which have been made with a view of placing before the reader the application of the rules governing deposits of securities, and chiefly of policies of insurance, to varied combinations of facts, is to show the great importance, to bankers, of providing that every transaction of this kind is fully completed, both, in other respects, and by giving notice to the insurers and others, so as to take the case out of the order and disposition clause, in case of bankruptcy, &c. For, although where the policy has been actually handed over, and is in the hands of the bankers, as a security, for the repayment of a previously existing debt, the assignees cannot recover the document in trover, and the bankers' lien upon it is said to remain although no notice has been given of the deposit to the insurers, yet practically such lien, it would seem, must be of little value; for the assignees may, notwithstanding, give a discharge to the office for the debts, due upon the policy, to which the bankrupt was entitled.^(b)

Shares.—As to the effect of depositing railway, or other joint-stock company's, shares with a bank, by way of security, for advances.

A. and B. were partners in business as sharebrokers, and were also in the habit of buying and selling shares in partnership; they dissolved partnership on the 11th of October, 1844, of which their bankers, with whom they had opened an account on the 14th of August, 1844, had notice. A., who was the partner that attended to this portion of the business, had, previously to the dissolution, contracted to purchase a number of scrip shares, in various railways, on account of the firm. After the dissolution, he deposited some scrip certificates of these shares [*189] with the bank; they *had not been paid for at that time, and he obtained from the bank an advance of money, on the security of them, for the purpose of paying the purchase-money, and he signed an authority to the bank, in the name of the firm, empowering them to sell

(a) *Dessborough v. Harris*, 3 Eq. R. 1058.

(b) *Gibson v. Overbury*, 7 M. & W. 561, 562; see *Joyce v. De Moleyns*, 2 J. & L. 374; *Ex parte Price*, 3 M. D. & D. G. 591.

the shares, if the money were not advanced, within a certain time. B. then institutes a suit in Chancery, against A. and the bankers, praying a declaration that B. was not bound or affected by the deposit of the shares, on account of the firm, or by any of the dealings and transactions which took place with the bank, after the dissolution of the partnership, &c.

The court, however, held, that, looking to the nature of the trade, which was that of buying and selling; that the shares were not like land or property, to be retained and used by the firm; that the debt, in respect of the shares, was, from its nature, one which must be immediately due; that A. was authorized, by B., to purchase the shares; that his only alternative was to complete the purchase, by paying for the shares, or to resell; he had authority, notwithstanding the dissolution, to do the former, by raising money as he did, and to empower the bankers to sell, in default of repayment.(c)

The customer, in a case where the Liverpool Albion Bank were the bankers, to secure an advance made to him, deposits certificates of shares in a railway company, (which shares, by the provisions of the railway act, could only be transferred, by an instrument, of a prescribed form,) together with all instruments of transfer, in the prescribed form, except that the blank, for the transferee's name, was left unfilled. The bank gave notice of their lien to the secretary of the railway company. It was held, although the private act, constituting the company, expressly excluded persons, claiming by any other title than the mode pointed out in the statute, (which had not been, in all respects, complied with *here,) from any part or share in the profits of the undertaking, [*190] that the bank had a lien on the shares, and that, having paid certain calls in respect of them, they were entitled to add these sums to the amount already advanced, and that their lien extended as a security for the whole amount.(d)

Dock Warrants.—A deposit of dock warrants, duly indorsed, is a good security; for the property in the goods passes by the delivery of the warrants, which empower the holder to obtain actual possession of the goods.(e) So bills of lading, expressed to be made out to the order of the shipper or his assigns, transfer the ownership, so as to enable to take into possession; but not so as to bring an action.(f)

It is, perhaps, hardly necessary to state, that a deposit, expressly made, as a security for a specific portion only of a general balance, precludes the admissibility of any inference, that it was intended, as a security, for the whole of the general balance.(g)

When securities are assigned to A. and B., bankers and copartners, for moneys to be advanced by them, or either of them, to the assignor,

(c) Butchart v. Dresser, 10 Hare, 453; affirmed, 4 De G. M. & G. 542.

(d) Ex parte Dobson, 2 M. D. & D. G. 685; see 8 & 9 Vict. c. 16, s. 18. See as to invalidity of deed executed in blank, Hibblewhite v. M'Morine, 6 M. & W. 215.

(e) Lucas v. Dorrien, 1 J. B. Moo. 29.

(f) Thompson v. Dominy, 14 M. & W. 403.

(g) Vanderzee v. Willes, 3 Bro. Ch. C. 21; see Ex parte Vere, 4 Deac. & C. 321.

and A. survives B., it has been decided that, as the security was made to the two jointly, A. could give a sufficient discharge, for the whole amount, due on the security.^(h)

Title Deeds.—With respect to the deposit of title deeds, it is desirable to state the principal results of the decisions, many of which tend to show, that bankers have acted at *times, in such cases, as though [*191] they were *inopes consilii*, and have suffered accordingly.

Two traders, in partnership, having had, for many years, an account with a bank, deposit with them certain title deeds of an estate, belonging to one of the partners separately, as a security, for the balance which might be due to the bank, from the firm, from time to time, upon the account current. No written memorandum was, at that time, made of the object of the deposit, but afterwards, upon a further advance by the bank, the owner of the title deeds signed a letter, or memorandum, stating the deposit to be for securing that, as well as future, advances. The banking firm had some changes made in its members after the deposit was made, and, in point of fact, all the advances made by the banking firm, with whom the deposit was made, had been paid off by the traders; but fresh advances were made by the new banking firm, who continued to hold the deeds; it was, nevertheless, held that the security was a continuing security, and that the banking firm was equitable mortgagee of the estate to the amount of their advances.⁽ⁱ⁾

As between the bank and the general creditors of the bankrupt, who has deposited title deeds with them before bankruptcy, the bank has the priority and the best title; although the deeds deposited were old deeds, not including the conveyance from the depositor's vendor, but the intention of the deposit undoubtedly being to create a lien; that is, the bank are equitable mortgagees against the general creditors.^(k)

Title deeds of a leasehold estate are deposited with bankers, by way of equitable mortgage, for securing the balance of a customer's running account. He is then convicted of felony. The Court of Exchequer in Equity had no jurisdiction, as the *legal* estate is in the crown, to decree a sale of the estate, nor any power to compel a conveyance, by the crown, [*192] of the *legal estate, but only to declare the bank, as equitable mortgagees, entitled to hold possession of the property, until the crown should think fit to redeem the mortgage.^(l)

A sale would be decreed, in a case, where the crown had only an *equitable* interest.^(m)

It is to be observed, that the deposit must be made at such a time, and in such circumstances, as to be free from suspicion, otherwise the bank will not be allowed the advantage of the character of equitable

(h) *Brasier v. Hudson*, 9 Sim. 1.

(i) *Ex parte Smith*, 2 M. D. & De G. 314.

(k) *Ex parte Lacon*, 1 Bank. & Ins. R. 107.

(l) *Hodge v. Att. Gen.*, 3 Y. & C. Ex. 342. As to time from which the equitable mortgagee is entitled to the produce of the mortgaged estate, *Ex parte Smith*, 3 M. D. & De G. 680. As to fixtures, *Ex parte Tagart*, De G. Bank. R. 531; *Ex parte Barclay*, 5 De G. M. & G. 403; 12 & 13 Vict. c. 106, s. 125.

(m) *Prescott v. Tyler*, 1 Jur. 470; see 3 Y. & C. Exch. 346; *Ex parte Tyson*, 1 Jur. 472.

mortgagee; thus, where the deposit of a lease was made on the 16th of April, and the fiat in bankruptcy issued on the 2nd of May, the petition of the equitable mortgagee was refused with costs: *(n)* and there must be an actual deposit to constitute an equitable mortgagee; an order on a third party to deposit a lease when executed is not sufficient. *(o)* Also, the deposit ought always to be accompanied by a written memorandum of the object and purpose for which it is made, among other reasons, with a view to costs; *(p)* though this last consideration is now less important perhaps than it was a short time ago. At any rate, as regards costs, the decision will be adverse to the equitable mortgagee where a written memorandum has been lost, so far as regards the costs occasioned by such loss. *(q)*

In general, however, assignees of a bankrupt are entitled to apply to the court, for directions, in cases of equitable mortgage, and therefore, even in a clear case, where the assignees are requested by the bankers, who hold an equitable mortgage, to consent to a sale of the property, without putting the bankers to the expense of petitioning, [*193] the assignees will have the costs of the proceeding out of the mortgaged estate. *(r)* And it has lately been intimated by the Court of Appeal in Chancery, that the previous practice as to costs, namely, that an equitable mortgagee, by a mere deposit, paid the costs of the petition, but that a memorandum entitled him to his costs out of the proceeds of the sale of the mortgage, was incorrect; and in the case before the court, which was an appeal by an equitable mortgagee, from a decision of a commissioner, which the court reversed, they ordered the petitioners' costs of appeal to be paid out of the estate, and all other costs to be added to their security. *(s)*

The prudence and propriety, with a view to preventing disputes, and removing all ground for question and litigation, has been pointed out, of always taking a memorandum of the object and purpose for which the deposit was made, and numerous instances have occurred, in which much delay, in realizing the securities, would have been saved to bankers, if their advisers had been duly alive to these considerations; and although it has lately been held, as already pointed out, that the former practice, which made a difference between the costs of the usual order for sale, &c., when there was a memorandum of deposit, and when there was none, is no longer to be observed, yet that alteration does not weaken the force of the above considerations, or make it prudent to neglect to take the course recommended on these grounds. For it has been laid down, that,

(n) Ex parte Morgan, 1 M. D. & De G. 116; see also Ex parte Gillet, 3 M. D. & De G. 458; Ex parte Clouter, 3 M. D. & De G. 167.

(o) Ex parte Perry, 3 M. D. & De G. 252.

(p) Ex parte Rogers, 3 M. D. & De G. 297; Ex parte Ford, id. 457; Ex parte Gillet, 3 M. D. & De G. 458; see De G. Rep. 194.

(q) Ex parte Rogers, 3 M. D. & De G. 297; but see now Ex parte Barclay, 5 De G. M. & G. 417.

(r) Ex parte Stevens, 3 M. D. & De G. 317. As to form of order in case of bankers being equitable sub-mortgagees, see Ex parte Powell, De G. R. 405; Ex parte Burdiss, id. 406, n.

(s) Ex parte Barclay, 5 De G., M. & G. 417.

in doubtful cases, where there is no memorandum, the court leans against considering the deposit as securing antecedent debts.^(t) At the same time, it is not meant to suggest, that a deposit, without a written memorandum, is invalid; that notion is inconsistent with the *doctrine [*194] of the courts; for it is held, that a written memorandum of deposit is not essential; and that there may be a valid deposit in equity without a word, at least, when the possession of the securities cannot be accounted for in any other way, the holder being a stranger to the title and to the deeds.^(u) What is indispensably necessary is, that the bankers should have actual possession of the securities.^(x) An instance will show this more clearly than mere assertion can do.

A memorandum of deposit of securities is handed to a banker, stating that a policy of insurance, on the life of the depositor, had been deposited with the banker; but, in fact, the deposit is never actually made, and the policy remains in the hands of the depositor, and is found in his chest at the time of his bankruptcy. What then is the result? The transaction is wholly illusory, as regards the bankers; for the court held, that the property in the policy passed to the assignees of the bankrupt, and consequently the only resource for the bankers would be to come in, among the general creditors, and prove their debt.^(y)

On the other hand, an agreement to give a mortgage, and the delivery of title deeds for the purpose of having the agreement carried into effect, constitutes an equitable mortgage;^(z) but the mere casual possession of title deeds,^(a) does not.

A trader deposits certain leases of premises, accompanying the deposit with a memorandum, stating that the depositors were to be equitable mortgagees of the leases, and premises, *and fixtures, and appurtenances, as security for a debt. The trader continues in possession of the premises, &c., comprised within the memorandum, and becomes bankrupt.

The depositors petition in bankruptcy for the realization of their security. The leases, and trade and other fixtures and fittings up, are sold under an order. The Lord Chancellor decided, on appeal from the commissioner, that the depositors were entitled to the proceeds of the whole, without excepting the trade fixtures, which he held not to be in the order and disposition of the trader, so as to pass to the assignees within 12 & 13 Viet. c. 106, s. 125, and the costs of the petition were ordered to be added to the security of the depositors.^(b)

A person deposits with his bankers the title deeds relating to certain

(t) *Ex parte Martin*, 4 Deac. & C. 457.

(u) *Bozon v. Williams*, 3 Y. & J. 150; see 14 Ves. 606; 17 id. 230; 19 id. 258; *Chapman v. Chapman*, 20 L. J. (N. S.) Chanc. 465; see however *Lucas v. Dorrien*, 1 J. B. Moo. 29.

(x) It has been gravely doubted whether goods, in the possession of third parties, can be said to be in the possession, order and disposition of the bankrupt at all. *Per Rolfe, B.*, *Price v. Groom*, 2 Exch. 547.

(y) *Ex parte Halifax*, 2 M. D. & De G. 544.

(z) *Hockley v. Bantock*, 1 Russ. 141; *Keys v. Williams*, 3 Y. & Col. Ex. Eq. 55.

(a) *Lucas v. Dorrien*, 1 J. B. Moo. 29; *Russel v. Russel*, 1 Bro. Ch. C. 269; see 12 Ves. 197.

(b) *Ex parte Gawan*, 25 L. J., Bank. Cases, 1.

steam-mills, cottages, land, buildings, and machinery, of which he was possessed, for an estate in fee simple. The original memorandum of deposit was not forthcoming, but a draft of it was proved, and it purported to be made for securing to the bank all moneys then owing to them by the depositor, and which should in future be advanced to him by them, together with bankers' commission, and all other usual charges, and also all balances which should, at any time, be due from the depositor on his banking account, together with interest for the same, after the rate of 5% per cent. per annum. After the date of the deposit, the depositor erected buildings for crushing bones, and also for crushing oil seeds, with the necessary machinery and steam-engine, all affixed to the freehold. This was held to be an equitable mortgage, giving a lien on the fixtures, whether erected before or after the time of the deposit, and including those that were removable as between landlord and tenant.(c)

A similar deposit of a lease would operate as an equitable mortgage of all *fixtures*, although erected for the purposes *of trade, and therefore removable as between landlord and tenant; and although [*196] the fixtures are not specified in the lease, or in the memorandum of deposit.(d)

In cases of equitable mortgages, by manufacturers, questions sometimes arise as to the passing, under the deed, of the machinery, &c. The following cases exemplify the principle that has been adopted for the decision of such questions.

A customer of a bank, being *owner* as well as occupier of a freehold cotton mill, executed to the banker a mortgage in this form: viz., the customer, by indenture, "demised and assigned unto the banker certain plots of land, factories, mills, warehouses, erections, and buildings, together with the steam-engines, and also all and singular other the movable and fixed machinery and steam pipes then in, upon, about, and belonging to the said steam-mills and premises, or occupied or used therewith, to hold to the said banker, &c., for 900 years, for securing the repayment of the moneys then owing from the customer to the banker, or thereafter to become due, not exceeding in the whole 5,000*l.*, with interest at 5% per cent.;" with a power to the banker to sell and dispose of the premises, for better realizing and securing the said principal moneys and interest.

The mortgagor continued in possession of the mill, &c., up to the time of his bankruptcy. In this case, not being one in which a tenant had put up the machinery, &c., but the case of an owner, who had himself erected all the works, it was considered that all such parts of the machinery as were legally attached to the freehold, passed with the freehold to the mortgagee, and were not goods and chattels going to the assignees of the bankrupt.(e)

(c) *Ex parte Price*, 2 M. D. & De G. 518; *Ex parte Lloyd*, 3 Deac. & C. 765.

(d) *Ex parte Broadwood*, 1 M. D. & De G. 631; *Ex parte Cowell*, 17 L. J. (N. S.) Bank. 16; *Ex parte Bentley*, 2 M. D. & De G. 591. As to utensils not fixed, it has been held that a lease of a house with movable chattels is no lease of the chattels, but a gift of them during the term, per *Burnett, J.*, *Ryals v. Rowle*, cited Report, 9 Bli. (N. S.) 390.

(e) *Ex parte Wilson*, 4 Deac. & C. 143; see 25 L. J., Q. B. 281.

[*197] *An equitable mortgagee, by deposit, is not, in general, as such, entitled to demand a legal mortgage to be made to him,^(f) unless there is a contract that one shall be made;^(g) in that case, the bankers will be considered, in equity, to be purchasers for good consideration within 27 Eliz. c. 4, in respect of the balance due to them, against a prior voluntary settlement.^(h) Nevertheless, at law, the trustees of the settlement may recover the deeds, in trover, from the bankers.⁽ⁱ⁾

A deposit of title deeds, *prima facie* creates an equitable mortgage upon the whole property comprised in them; and further, where the memorandum of deposit stated it to have been made, with the object, that the deeds should remain in possession of the depositor, till such time as the depositor's account, due to the depositor, did not exceed the sum of 100*l.*, at which time they were to be restored to the depositor, free of expense, and the depositor died indebted to the depositor in 274*l.*, it was decided that the lien extended to the whole 274*l.*^(j)

An equitable mortgagee, by deposit, of a lease, is not bound, *at the suit of the lessor*, to take a legal assignment of the lease, nor is he liable to the covenants of the lease,^(k) for there is no privity between him and the lessor, until he has made himself legal assignee; and so to hold, "would effectually prevent anybody from ever taking a deposit of a lease, as a security for a sum of money, for no man in his senses would take a deposit of a lease, if he were thereby to render himself liable to the covenants of the lease."^(l)

[*198] What an equitable mortgagee is entitled to, at the hands *of the court, is either a foreclosure, or a sale, at his option,^(l) but, in general, the mortgagor may have allowed him six months' time, in which to redeem the deposited deeds.^(m)

If the banker having such equitable mortgage, by deposit of the title deeds, of an estate in fee, enter into receipt of the rents of the mortgaged estate, such receipt amounts to a payment, *prima facie*, either of the principal or interest of the debt, as the case may be, so as to take the case out of the Statute of Limitations; and therefore, where the mortgagor was dead, it was considered, in such a case, that the bankers had probably a right to have the estate sold, the proceeds to be applied in

(f) *Parker v. Housfield*, 2 My. & K. 419; *Metcalf v. Archbp. of York*, 1 My. & C. 557; *Seton, Decrees*, (2nd edit.) 213; see *Buckle v. Mitchell*, 18 Ves. 100, compared with 5 Hare, 291.

(g) *Seton, Decrees*, (2nd edit.) 213.

(h) *Lister v. Turner*, 5 Hare, 281; see 11 M. & W. 531.

(i) *Kerrison v. Dorrien*, 9 Bing. 76.

(j) *Ashton v. Dalton*, 2 Coll. R. 565; and see S. C., as to interest.

(k) *Moore v. Greg*, 2 Phill. 717. Semb. mere equitable charge of leasehold property, without change of possession, &c., is no forfeiture, under a clause against assignment. *Bousier v. Colby*, 1 Hare, 109.

(l) *Perry v. Keane*, 6 Law J. (N. S.) Ch. 67; see *Seton, Decrees*, (2nd edit.) 212; *Birch v. Ellames*, 2 Anstr. 428; *Pain v. Smith*, 2 My. & K. 417, 422; see on this last case, 7 Sim. 442; *Girdlestone v. Lavender*, 9 Hare, liii.; see *Seton, Decrees*, (2nd edit.) 187, 211, 164; for forms of decrees in such case, *id.* 212.

(m) *Parker v. Housfield*, 2 My. & K. 419; *Thorpe v. Gartside*, 2 Y. & Col. Ex. Eq. 739; *Miller v. Woods*, 1 Keen, 16; *Seton, Decrees*, (2nd edit.) 211; 15 & 16 Viet. c. 86, s. 48.

payment of the debt, and to come in, as general creditors, for the balance.(n)

It is to be borne in mind, however, that if a banker being equitable mortgagee of land, takes upon him to assume the right of taking possession, without applying to a court of equity for leave or direction to do so, and unreasonably and unnecessarily for the purpose of defending any right given him by his mortgage, defends an action at law brought against him, in consequence of his so acting, and is unsuccessful in his defence, he will not be allowed the costs out of the mortgaged estate.(o) In general, an equitable mortgagee is not entitled to the rents and profits prior to the date of the order of sale.(p)

*An equitable mortgage may be established by means of written documents, coupled with parol evidence, against a prior [*199] voluntary settlement,(q) but an equitable mortgagee will not be preferred to a subsequent legal mortgagee, who has no notice of the equitable mortgage, and the onus lies upon the former, claiming a priority, to prove that the latter had such notice.(r)

In reference to questions respecting freehold or leasehold security, it may be well to point out, that the deposit of the lease of a house, or of deeds of conveyance of a house and furniture to the depositor, does not, by any means, necessarily extend to charge the furniture in the house.

Thus, where A. deposits with B., as security for a debt, certain deeds of lease and release, by which a freehold house at Bognor, and the furniture therein, were conveyed and assigned to A., and the memorandum of deposit was "Herewith I hand you the title deeds of my Bognor estate, to be held by you, &c.;" these words were decided not to extend to the furniture, which, under them, did not pass to B., nor did any interest in the furniture. If it had been the intention that the furniture should be included in the security, B. ought to have taken care that A. so expressed his memorandum of deposit, as to include the furniture, and that a schedule was added enumerating the different articles.(s)

It seems, however, that when a lease of a house is deposited, on the sale of the lease and goodwill of a business, established in it, the depositor is entitled to the whole of the price, whether it be considered to arise from the goodwill, or from the value of the lease, independently of the good-will.(t)

A parol agreement, that when a lease shall be granted, &c., it shall be deposited, as security, for a sum advanced, *does not constitute [*200] an equitable mortgage,(u) though an agreement to mortgage real

(n) *Brocklehurst v. Jessop*, 7 Sim. 438; see *Seton, Decrees*, (2nd edit.) 188, 211, 163.

(o) *Dryden v. Frost*, 3 My. & C. 670; see *Ex parte Fletcher*, Mont. R. 454.

(p) Per *Ld. Eldon, C.*, *Ex parte Alexander*, 2 Gly. & J. 275; *Ex parte Bignold*, 4 Dea. & C. 259; see *Ex parte Cocks*, 3 Dea. & Ch. 8. As to sale, see 2 Dea. & C. 60, 61, 59. As to insolvency, *Garry v. Sharratt*, 10 B. & C. 718.

(q) *Ede v. Knowles*, 2 Y. & Col. Ch. R. 172.

(r) *Ex parte Hardy*, 2 Dea. & C. 393.

(s) *Ex parte Hunt*, 1 M. D. & De G. 139.

(t) *Chisum v. Dewes*, 5 Russ. 29. Decree for sale of lease, *Seton, Decrees*, (2nd edit.) 212.

(u) *Ex parte Coombe*, 4 Mad. 249.

estate, followed up by a subsequent deposit of title-deeds of the estate, will amount, in equity, to a mortgage, and will be effectual from the date of the agreement.^(x)

If a mortgagee, for a term of 500 years, deposits with a banker the mortgage deed, as security for 800*l.*, and interest, and afterwards purchases, of the mortgagor, the equity of redemption, there being no memorandum of deposit, and afterwards becomes bankrupt, &c., the whole of the bankrupt's interest in the property must be sold, and the assignees must join in the conveyance to the purchaser.^(y)

When the deposited documents are title-deeds, which have been deposited with the customer by a third party, with a written memorandum of the object of their deposit with him, it is not necessary, to constitute a valid and equitable sub-mortgage to a banker, that the original memorandum should also be deposited.^(z)

A memorandum, in writing, of deposit, which states the deposit to be, for the purpose of securing any sum or sums of money which *may* be advanced by the banker, does not necessarily prevent the security from applying to past advances,^(a) and if a specific sum be mentioned in it, the amount may be increased by a subsequent verbal agreement.^(b)

A banking house, in consideration of an existing debt, and of a further advance of money to a customer, obtained from him a deposit of all the title-deeds of certain freehold and copyhold lands of which he was seised, with a written memorandum, signed by him, regularly charging the lands [*201] *with payment of the whole debt and interest. Other creditors subsequently recovered judgment against him, and, under 1 & 2 Viet. c. 110, s. 13, sued out elegits, under which the sheriff delivered to them the whole of the land. The bankers, having filed a bill in chancery, praying that they might be declared to have an equitable mortgage upon the land, and to be entitled to priority over the elegits and judgments, had their prayer granted, *there having been no laches on their part*, and their title being perfected before the judgments were recovered.^(c)

The bankers, it may be observed, having perfected their title as equitable mortgagees, must have been preferred to the judgment creditors in this case, independently of the statute.^(c)

Indeed, such perfected equitable mortgage will prevail, even against an extent at the suit of the crown,^(d) except where the mortgagor is an accountant to the crown.^(e)

A deed of conveyance of the legal estate in fee, in the impropriate tithes of Kilcolman, was deposited by way of equitable mortgage with a

(x) *Edge v. Worthington*, 1 Cox. Ch. Cas. 211.

(y) *Ex parte Tufnell*, 4 Dea. & Ch. 29.

(z) *Ex parte Smith*, 2 M. D. & De G. 587.

(a) *Ibid.*

(b) *Ex parte Nettleship*, 2 M. D. & De G. 124; *Ex parte Langston*, 1 Rose, 26. The same does not hold of a *legal* mortgage. *Ex parte Hooper*, 2 Rose, 328.

(c) *Whitworth v. Gaugain*, 3 Hare, 416; affirmed, 1 Phill. R. 728, and adopted, *Watts v. Porter*, 3 E. & B. 743; see 25 L. J., Ch. 544.

(d) *Casberd v. Att. Gen.*, 6 Price, 411; confirmed, *Watts v. Porter*, 3 E. & B. 743, 753; so *Fector v. Phillpott*, 12 Price, 197.

(e) *Broughton v. Davies*, 1 Price, 216.

bank, in consideration of an advance of money by a person who was heir-at-law and administrator, with the will annexed, to the grantee of the conveyance, who was deceased, and who, by his will, devised all his right, title, and interest, in the tithes of Kileolman, (he being, at the time of making his will, only equitable mortgagee of the same,) to A. B. The administrator made the deposit without the knowledge of A. B., who, from the time of the death, had been in possession of the said tithes, and had frequently applied to the administrator for the deed, but could not obtain it. The bank, two years later, filed a bill against the administrator for a sale, &c., and final decree for sale was pronounced.

*In such circumstances, the bankers being purchasers for [*202] valuable consideration, without notice of the will of the testator, or of the title of any person claiming under it, will be protected in equity; and it makes no difference, that the person, really entitled to the tithes, may have trover for the deeds in a court of law, and must succeed *there*. Hence, they can make no practical use of the deeds; and they cannot maintain possession of them, against the true owner of the tithes, who, as such, is entitled to the deeds; but, in equity, they have the right to say, that they ought not to be compelled to deliver them up, as they obtained them *bonâ fide*, and without notice.(f)

Where the bankers take a mortgage as security, the principal point to be considered is, that the lands, &c., meant to be charged, shall be precisely specified or designated. It is true that the intent to give a general charge upon all the property, &c., of the mortgagor, may be explained aliunde, but the shortest, the safest, and the least troublesome and expensive, mode of effecting an arrangement of this kind is, to have care taken, that the mortgage deed is made as complete as possible within itself, so as to require no subsequent propping up. The following case seems to be in point to show this.

Articles of agreement, under seal, were entered into by a banker, in the country, in order to secure a bank in London, the correspondents of the former, for advances, with the latter, reciting that the country banker had agreed to give the latter a mortgage on his *freehold* estates at Iver, subject to the charge affecting the same, and the country banker agreed to execute a mortgage of *all his estate and interest* in the lands, tenements, and hereditaments, at or near Iver. Part of the property, at Iver, was mortgaged to a third person, and a part also was copyhold. It was held, that, notwithstanding the recital, the security extended to the property at Iver which was not subject to any previous *charge, [*203] and, also, to the copyholds; and, also, that the intention to give a general charge, on all the property, might be explained by other written memoranda of agreement; and the London bankers were declared to be equitable mortgagees until the amount due, in respect of their security, should be realized.(g)

(f) *Joyce v. De Moleyns*, 2 Jo. & L. 374.

(g) *Ex parte Glyn*, 1 M. D. & De G. 29. An equitable mortgage may be made by deposit of copy of court roll. *Lewis v. John*, 9 Sim. 366; *Whitbread v. Jordan*, 1 Y. & Coll. Ex. Eq. 303; *Tyler v. Webb*, 6 Beav. 552; see *Decree*, *Price v. Carver*, 3 My. & C. 157, 163.

Exchequer Bills.—Where A. deposited an exchequer bill (with the payee's name in blank) with B., in order that he might sell it, but B., instead of doing so, places it in the hands of his bankers, who advance him money to the amount of its value; B., having become bankrupt, it was held, by the majority of the Court of King's Bench, that A. had no right of action, against the bankers, to recover the bill, because the property in exchequer bills passes by delivery.^(h) It will be observed, it was the negligence of A., in not filling up the blank with his own name, that rendered it impossible, for the bankers, to know or suspect that B. was not dealing properly with the document; if A. had so marked the bill, and the bankers had taken it, without any injury, perhaps the result might have been different. Mr. Justice Bayley, however, differed from the rest of the court, and considered that exchequer bills were not on the same footing as bills of exchange, and, therefore, not within the law and custom of merchants, as applicable to bills of exchange, but that they were to be taken to be goods and chattels, and subject, therefore, to the rule that the pawnor of goods cannot, in general, [*204] convey a better title than he *possesses, and that the bankers were guilty of negligence in not ascertaining B.'s right to dispose of the instrument.

Deeds, relating to a trust estate, were deposited, for safe custody, at a bankers', in a tin box, marked "New's Trust." One of the *cestuis que trustent* afterwards opens an account with the bank, and, on its appearing that his account was overdrawn, makes a parol agreement, with the bankers, that they might hold the deeds, so far as they related to his interest in the estate, as a security for his current account. Afterwards, a deed of partition being executed between the customer and the other persons interested with him in the estate, he signs a memorandum, stating that he has deposited the deeds therein described, "as a collateral security for any advances you may make on my behalf." The deeds described in the memorandum were those already in the possession of the bank; the deed of partition was not deposited; but the whole circumstances showing, that the intention was to secure the bankers against past as well as future advances, to be gathered from various conversations held by the customer with one of the partners, and with one of the clerks of the firm; it was decided, that such was the effect of the deposit, and that the bankers were equitable mortgagees of the estates held in severalty by the customer, and that the security extended to advances made as well before as after the date of the memorandum.⁽ⁱ⁾

Promissory Notes.—For persons having pecuniary connections with the East Indies, the following decisions may be serviceable, as showing the relations between them and banks in Calcutta, &c., which they may constitute their agents, in certain cases.

(h) *Wookey v. Pole*, 4 B. & A. 1; *Form of Excheq. Bill*, id. 2. Navy bills do not pass without assignment. *Maclish v. Ekins*, Sayer, R. 73; see 4 B. & A. 13. So in case of bills of exchange, indorsed in blank and pledged, the real owner cannot have trover. *Collins v. Martin*, 1 B. & P. 648; *Treuttell v. Barandon*, 1 J. B. Moore, 543.

(i) *Ex parte Farley*, 1 M. D. & De G. 683.

The payee of some promissory notes of the East India Company, by power of attorney, authorized his agents at Calcutta, a firm of bankers, to "sell, indorse, and assign" the notes, which were transferable by indorsement, and payable *to bearer. The agents, in their character of bankers, borrowed money of the Bank of Bengal, [*205] offering as a security, these promissory notes. The Bank of Bengal made the advance, the agents indorsing the notes, and purporting to make the indorsement, as attorney for their principal; they deposited the notes with the Bank of Bengal, by way of collateral security for their personal liability, at the same time authorizing the Bank of Bengal, in default of payment, to sell the notes, in reimbursement of their advance. The agents afterwards became insolvent, and default having been made in payment, the Bank of Bengal sold the notes and realized the amount of their loan. The indorsement of the notes, by the bank, was considered, by the judicial committee of the privy council, to be within the scope of their authority, given them as agents of the payee, by the power of attorney; and, consequently, the payee could not recover in detinue, against the Bank of Bengal. (k)

A banker having made advances to A., takes his promissory note for 400*l.*, payable on demand, with lawful interest, as a security for the advances. The banker subsequently indorses the note to B., as a security for money placed in his hands by B. Some time afterwards, A. and the banker settle their accounts, and A. pays the balance, but neglects to ask for the note, which is not delivered up to him. Then the note passes backwards and forwards several times, between the banker and B., during all which time the former was indebted to the latter in more than 400*l.*; the banker, on one of these occasions, telling B. that it must not be negotiated, as he should want it when he settled accounts with A. When this communication took place did not appear exactly, but it was before the last time the note was deposited with B.; and it was held to be decisive to show that *it was not negotiated to B., but only deposited with him as a pledge. It was held, [*206] therefore, that B. (or his assignees on his bankruptcy) could not, after the settlement of accounts between A. and the banker, without a redelivery of the note to A., recover on it against A. (l)

Where bankers take the security of a joint and several promissory note, signed by the customer and another person as surety, for a floating balance, in their account with the customer, due to them, the surety is held to be released, by the bankers' crediting the customer with the full amount of the note, without advancing the money at the time. (m)

Bonds, Bills, &c.—Again, where a trader deposits, with his bankers, a bond for the payment of a sum of money, with interest, given by X. to Y.; certain bills of exchange drawn by Y. and accepted by X. (as security, for the payment of which, the bond had been given;) and a mortgage of the bond and bills by Y. to the trader, it was decided that,

(k) *Bank of Bengal v. Macleod*, 5 Moo. Indian App. C. 1; 7 Moo. P. C. 35; S. P., *Bank of Bengal v. Fagan*, 5 Moo. Indian App. C. 27; 7 Moo. P. C. 61. See *infra*, 207.

(l) *Roberts v. Eden*, 1 B. & P. 398.

(m) *Archer v. Hudson*, 7 Beav. 551.

as it had been already settled by former decisions, that bills of exchange, when deposited, did not require notice to be given to the debtor, to take them out of the operation of the bankrupt laws, as to order and disposition; so a bond which was given to secure the payment of bills of exchange, for the benefit of the holders, did not, under these circumstances, require notice to be given to the obligor.⁽ⁿ⁾

In a former case, however, notice was held to be necessary to give validity to a deposit of a warrant of attorney, which was expressed to be executed to secure payment of bills of exchange, one of which was deposited as part of the security. But, in that case, the deposited bill had not been indorsed, and there was only an equitable right in the [*207] depositor to have his security completed, by the indorsement of the bill.^(o)

A deposit, by way of mortgage, of a land order of the New Zealand Land Company, is good, although no notice be given to the company of the deposit.^(p)

A banker, taking security from a customer, by a bond executed by the customer, and A., as his surety, conditioned for the payment of all sums already (at the delivery of the bond) advanced, or thereafter to be advanced, by the banker to the customer, does not necessarily lose his right of suing the customer, as on a simple contract, for the balance of the customer's account, at any time after the making and accepting of the bond. In other words, the simple contract debt is not merged in the specialty,^(q) at least when the balance is due to a banking copartnership, and the bond is given to two persons, managing directors of the company, for the time being, especially if it appear that the bond was, in truth, neither given nor taken, with any intention of being applied to cover more than a specific sum, whilst the balance might become larger than that sum, so that the bond was clearly intended as a collateral security only.

Where a person gives a promissory note to a bank, it being made by him in their favour, with the intention thereby to satisfy a liability from which he was discharged at law, but in ignorance of the facts constituting such discharge, there the bank cannot enforce the note, although the drawer had the *means* of knowing the facts.^(r)

A trading firm in Calcutta, having borrowed a sum of money from the Bank of Bengal, deposited East India Company's paper with the bank, to a greater amount, as collateral security, accompanied with a written authorization, to the bank, in case of default of repayment of the loan, [*208] by a *given day, to sell the East India Company's paper, for the reimbursement of the said bank, rendering to the firm the surplus. Before default, the firm are declared insolvents, under 9 Geo. IV. c. 73, the Indian Insolvent Debtors Act, by the 36th section of which,

(n) Ex parte Barnett, De G. Bank. R. 203; see Ex parte M'Turck, 2 Deac. 58.

(o) Ex parte Price, 3 M. D. & De G. 586.

(p) Ex parte Barnett, De G. Bank. Rep. 203; see Ex parte M'Turck, 2 Deac. 58.

(q) Holmes v. Bell, 3 M. & Gra. 213; and see S. C., 3 Scott, N.R. 479. The merger, to be taken advantage of, ought to have been specially pleaded.

(r) Bell v. Gardiner, 4 M. & Gra. 11.

(similar to 6 Geo. IV. c. 16, s. 56,) when mutual credit has been given by the insolvent, and any other person, one debt, or demand, may be set off against the other, and all such debts as might be proved, under a commission of bankruptcy, in England, might be proved in the same manner, under the Indian Insolvent Act.

At the time of the adjudication of insolvency, the bank were also holders, for value, of two promissory notes of the same firm, which they had discounted for them, previously to the transaction of the loan, and the deposit, &c. When the time, for the repayment of the loan, expired, the bank sold the company's paper, the proceeds of which, after satisfying the principal and interest due upon the loan, produced a considerable surplus. In an action by the assignees, against the bank, to recover the surplus, it was held, that the bank could not set off the amount of the promissory notes, which were then due and unpaid, and that the case did not come within the clause of mutual credit, in the Bankrupt Act.

The case is important, because the court held it to be manifest, that it was to be dealt with, and disposed of, exactly as if it had arisen, in a proceeding in a bankruptcy, under the English Act.^(s) It is to be observed, that the bank gave credit, to the firm, for the amount of the notes, but there was no corresponding credit given, by the firm, to them; it was, therefore, uncertain whether there would be any money coming to the firm or not; and if the assignees had redeemed the company's paper, there would not have been any: the credit was all on one side.

*If a trader has securities bailed to him, in order, that by depositing them, he may get credit with the bank of A., he is not authorized, after having redeemed them, from the bank of A., again to deposit them, in order to obtain credit with the bank of B., although the securities had been indorsed to him. [*209]

When a trader deposits securities, in his possession, for the purpose of obtaining credit, and does so without the knowledge of the owner of the securities, he is not to be considered, if he redeems them, to have given fraudulent preference to the owner.^(t)

Marriage Settlements.—In a case where a person had assigned his life interest, under his marriage settlement, in stock, standing in the names of the three trustees of the settlement, to A., and shortly afterwards A. had communicated the fact to one of the trustees, who, however, was not the acting trustee, and the communication was not made with any intention of giving validity to the assignment, and A. had several subsequent communications with him on the subject, it was held, that the object with which the communication was made was immaterial, and that notice to one trustee was notice to all.^(u) If the trustee has actual knowledge, at the time the transaction takes place, the principle of law may be taken to be,^(v) that what a man knows for one purpose he

(s) *Young v. Bank of Bengal*, 1 Moo. P. C. 150, more fully, 1 Deac. 622.

(t) *Sinclair v. Wilson*, 24 L. J., Ch. 537.

(u) *Smith v. Smith*, 2 Cro. & M. 231; *Meux v. Bell*, 1 Hare, 73; see per Lord Langdale, M. R., 2 Keen, 53.

(v) See 1 Hare, 88. Notice to the solicitors of trustees is good notice to them.

knows for all; and you do not inquire whether he learnt it in one character or in another.(*e*)

But, in the case of executors, notice to one is not, in all cases, notice to all, though the others, in point of fact, never *heard of any [*210] dealings at all;(w) at least, when the transaction is between the acting executor and his son, the father being an interested party, and there being no ground to presume that the fact was communicated to the others, each of whom had separate authority to receive and pay.(w)

Goods.—A pledge of jewels is made, as security for a debt, at the time of the pledge, existing. The customer, afterwards, borrows other sums upon a general account, and then insisted upon his right of redeeming the jewels, on payment of the first debt only. It was held that he must pay the whole; but it was admitted, that if there had been bond creditors, or in case of a bankruptcy, the pledge could have been retained only for the first sum, and the bankers, in such case, must have come in, under the *fiat*, for the remainder.(x)

Bankers advance a sum of money to the wife of a person absent in India, on the security of a chest of plate, deposited with them, and on the guarantee of a customer. This sum was repaid to the bank. Afterwards they advance another sum, with the consent of the guarantor, the plate still remaining in the keeping of the bankers; the wife had authority to pledge the plate, in case of emergency, and the customer himself repaid the second loan. Then the husband dies intestate, and his administrators sue the bankers for the recovery of the chest of plate; but the plea of the bankers, that they held it in virtue of the customer's lien on it, and by his request, was a good answer; for that, under the above circumstances, the bank might be taken to have made the second advance on the credit of the customer, who, consequently, had a lien on the chest [*211] of plate, although *there was no previous arrangement or contract with him.(y)

If the security offered be goods, the banker ought to bear in mind the imprudence of entering into such transaction by way of half measures; the transaction ought to be made complete, or not entertained at all; it ought, for the bankers' safety, to be left on such a footing, as will bear legal scrutiny, or it ought never to be taken in hand. To make such transactions valid, there ought to be a bill of sale, executed by the debtor, under which actual possession of the goods ought to be taken and retained. The following case illustrates this.

A trader, being in advance with his bankers, gave them a receipt for 10,000*l.*, purporting to be the purchase-money of the furniture, fixtures, plate, effects, &c., in his dwelling-house, but no possession of the goods was given, at that time, and no bill of sale was executed. More than a

Foster v. Blackstone, 1 My. & K. 297; S. C., nom. *diverso*, 9 Bli. (N. S.) 375, 376; see also Gale v. Lewis, 9 Q. B. 742.

(*e*) See preceding note.

(*w*) Tunson v. Ramsbottom, 2 Keen, 35, 53; see 1 Hare, 96, 97; per Sir E. Sugden, C., *Ire.*, Ex parte Hennessy, 1 Connor & L. R. 562; S. C., 2 Dru. & War. 555.

(*x*) Demainbray v. Metcalfe, Prec. Ch. 419; S. C., 2 Vern. 691, as explained in Adams v. Claxton, 6 Ves. 229, per Sir W. Grant, M. R.

(*y*) O'Connor v. Majoribanks, 7 Jur. 834, C. B.

year afterwards, the bankers sent a person, to whom possession was given, by the trader's delivering him a chair, on behalf of the bankers' possession, of all his furniture and effects, in and about the premises, and on the same day, the trader filed a declaration of insolvency, and sued out a fiat in bankruptcy against himself. It was contended, that this delivery of possession was an act of fraudulent preference. The court considered otherwise, but left, undecided, the question as to the effect of the joint possession of the trader's servants, and the person sent by the bankers, of the goods, &c., in the trader's house, seeming to think the trader ought to have left the house, and relinquished the physical dominion of the whole to that person,^(z) otherwise no one could know that *the latter was in possession, or that the goods were not in the order [*212] and disposition, &c., of the bankrupt, at the time, &c.

The result of this is, therefore, that the safe mode for a banker to adopt, who wishes to secure himself, in respect of advances to a customer, in a similar manner, is to take a bill of sale of the goods, &c., and insist upon having full possession given up to him.

Goods, &c., at Sea.—A banker may also safely take an assignment, by way of mortgage, of a ship and cargo, while the ship is on her voyage, which will operate, in equity, to assign as well the future cargo, as that, if any, which existed at the time of the assignment, and if notice be sent to the master of the vessel, and the master deliver up possession of the ship and cargo, shortly after her return from the voyage, the equitable title of the banker will be considered to be complete, and not to be defeated by a judgment creditor of the assignor, who afterwards sued out a writ of execution, and proceeded to take the ship and cargo in execution.^(a) If an equitable mortgage, not registered, is taken, it must be remembered that it will be postponed to a subsequent registered mortgage, though the subsequent mortgagee had notice of the prior equitable mortgage.^(b)

If bankers take, from a consignee of goods, in consideration of advances, the security of a bill of lading, (indorsed generally to bearer,) and of a policy of insurance on ship and goods, effected by the consignee, in pursuance of an agreement with the bankers, both deposited with them, and they pay the premium to the insurance company, the insurance *being, in fact, effected to secure them, they may sue in [*213] their own names, upon the policy for the loss or damage incurred; if, on the other hand, the consignee had, in the first instance, insured

(z) *Ex parte Majoribanks*, De G. Bank. R. 477, referring to *Mace v. Cadell*, Cowp. 232; *Latimer v. Batson*, 4 B. & C. 652; *Woodall v. Smith*, 1 Campb. 333; see also *Ex parte Castle*, 3 M. D. & De G. 117; *Fawcett v. Fearne*, 6 Q. B. 20; *Ex parte Sharp*, 3 M. D. & De G. 490, 494. Where the original owner, in pursuance of an agreement which was (it is stated) notorious in the neighbourhood, remained in possession of the furniture, &c., in the house, and became bankrupt whilst so remaining, it was held not to be a possession by the bankrupt within the statute 21 Jac. 1, c. 19, s. 11; *Muller v. Moss*, 1 Mau. & S. 335; S. C., 2 Rose, 99; see also *Price v. Groom*, 2 Exch. 542. A mortgage of chattels may be without deed, *Flory v. Denny*, 21 L. J. (N. S.) Exch. 224.

(a) *Langton v. Horton*, 1 Hare, 549.

(b) *Coombes v. Mansfield*, 3 Drewry, 193.

the ship and goods, not in the capacity of agent for the bankers, but in the ordinary way of business, and then had agreed for the deposit of the bill of lading, and the policy, with them, the action could only have been brought in the name of the consignee.^(c)

The next case we shall cite is a case of a mortgage, by deed, of ship and freight, &c.

One of two partners, whose firm had an account with a bank, obtained discount of a promissory note, made by the firm, from the bank, on an agreement for a mortgage of shares, belonging to the firm, in certain ships, and their freight, and of the policies of insurance effected by the firm on the shares. A mortgage deed was prepared accordingly, purporting to be made by both partners, but it was, in fact, executed by the one only, the other refusing. At the time of the execution of it, one of the ships was lost, but the fact was unknown to the parties. The security was held to be binding on the firm, notwithstanding the execution by one partner only, and to pass the insurance money, although the deed was not registered according to the shipping acts. The deed purported to be for securing the balance of the account current. Notice was given, by the bank, to the underwriters, previously to any act of bankruptcy. The case was considered to be distinguished from those, in which the courts have laid down or acted on the rule, that one partner cannot bind copartners by deed, by the circumstance that there was, in this case, a previous contract, by or on behalf of the firm, to execute the mortgage, [*214] which was a *transaction, within the authority of the partner, to bind the firm, by means of.^(d)

But it is unquestionable, that many difficulties and niceties involve this subject; and moreover, probably in no case, where it can possibly be avoided, ought a banker to attach any great value to the assignment, as a security, of a marine insurance.^(e)

The following case is somewhat peculiar, but may properly be stated here, with a view to further illustrating the position of bankers, as regards questions relating to security on goods on board ship.

Brown, a merchant, at Liverpool, had a banking account with Smiths, Sons & Co., bankers in London, who also carried on the business of merchants, under the firm of Smiths and Atkinson, in London, and it was agreed that, for the purpose of securing advances, which Smiths, Sons & Co. might make to Brown in answering his drafts, &c., Brown should remit them good bills of exchange, should lodge a credit with two houses at Hamburgh, against goods consigned to those houses, to a certain amount, of which Smiths, Sons & Co. should avail themselves, &c., and also as a collateral security, that Brown should consign, to the house of Smiths and Atkinson, certain goods on sale for their account; and ac-

(c) *Sutherland v. Pratt*, 12 M. & W. 16. See as to stamp, *Harris v. Birch*, 9 M. & W. 591. When the bills of lading had been handed over before, but not indorsed till after, the bankruptcy, see the explanation of the decisions given, *Belcher v. Capper*, 4 M. & Gra. 548, 549.

(d) *Ex parte Bosanquet*, De G. Bank. R. 432. See as to assignment of shares in a ship, *Douglas v. Russell*, 4 Sim. 533.

(e) See *Boddington v. Castelli*, 23 L. J. (N. S.) Q. B. 32.

cordingly Brown remitted to Smiths and Atkinson the invoice of a cargo and bill of lading, indorsed in blank. But the ship, in which the cargo was loaded, was prevented leaving Liverpool, by an embargo. Some-time afterwards, Brown became bankrupt, the balance of accounts being in favour of Smiths, Sons & Co., and the cargo was delivered, by the captain of the ship, to the assignees. It was held, that the indorsement and remittance of the bill of lading, to Smiths and Atkinson, in accordance with the *previous agreement of the parties, changed the property in the goods, which were to remain in their hands, [*215] clothed with the trust expressed in the agreement, and that Smiths and Atkinson might, therefore, maintain trover against the captain, to recover the value of the cargo.(f)

As there is no doubt that a person may give an effectual security upon property of his at sea, before it has come to hand, so he *may* also pledge a policy of marine insurance with another person, or with bankers, and they, if due notice have been given to the underwriters or insurance company, will be entitled to receive the principal sum insured, upon the event insured against happening. The cases cited below show this. The following facts are detailed, for the purpose of showing an instance of a defective deposit of this class.

A. opens an account with a bank, the arrangement being, that he should be allowed to overdraw to a certain amount, but that, if he over-drew beyond that amount, he should find security; eventually he over-drew beyond the specified amount, without finding security; the bank pressed for payment of the whole, or at least a portion, of the balance. A., in reply by letter, stated that the arrival of the ship *Tagus*, which was daily expected, would enable him to adjust the account, and inclosed a policy of insurance on the cargo of the *Tagus*, indorsed payable to the manager of the bank, the indorsement being signed by A. The bill of lading was not deposited, and when the bankers applied for it, A. stated his inability to part with it, acknowledging that he was in insolvent circumstances, and could not, in duty to other creditors, part with the possession of any of their assets. On these facts, it was held that the letter and indorsement of policy did not create such a specific charge or lien on the cargo, as would entitle the bank to *priority* over general creditors.(g)

*This case turned entirely on the expressions used in the [*216] letter.

Change of Firm.—The question may frequently arise, in practical banking, as to the effect, of a change of firm, upon a security, deposited with the bank, before the alteration. The following case will tend to explain, the position of the bank, in such circumstances.

A. deposits with a bank, by way of security, for advances, a joint and

(f) *Haille v. Smith*, 1 B. & P. 563.

(g) *Jones v. Starkey*, 16 Jur. Ch. 510; see also *Castelli v. Boddington*, 22 L. J. (N. S.) Q. B. 5; S. C., in error, 23 id. Q. B. 31. A person may give a valid security on merchandise at sea belonging to him, although at the time he is in ignorance of the particulars of which it consists, *Ex parte Kelsall*, De G. Bank. R. 352.

several promissory note, made payable to order on demand, with interest, whereby A. & B. promised to pay, on demand, Pease and others, and R. H. or order, 300*l.*, with interest. A. pays interest regularly. At one time he had a balance, in the bankers' hands, exceeding the amount of the note. After the note is deposited the firm changes. Held by the court—

1. The note being a continuing security, inasmuch as it is made payable to order, might be indorsed, notwithstanding the change in the banking firm.

2. The note not having been indorsed, the original payees, being a partnership, or the survivors of them, were the proper parties to sue upon it.

3. The note was not discharged, by the fact of A.'s having at one time, since the deposit of it, in the bankers' hands, a balance exceeding its amount.

4. Payment within six years, of interest, by A., took the note out of the operation of the Statute of Limitations *as to B.*(*h*)

Whenever, therefore, bankers take a security of this kind, it is indispensable for their security, either that they indorse *the note [*217] within the six years from its date, or that they put it in suit within that time, or that they take care that the interest is regularly paid upon it, in order to make it effectual as a security, and guard themselves against loss.

Where a customer deposited title deeds of copyhold estate with his bankers, the deposit being agreed to be as a security, not only for a sum already advanced by the bankers to him, but also for any other sums of money which might be afterwards advanced by the firm. Afterwards, one of the firm dies, and another person is afterwards added to the firm, every thing else remaining the same as before, in the relations of the customer to the firm. About six years elapse, when a fiat in bankruptcy issues against the depositor, and it becomes a question whether the deposit enures to the benefit of the new firm: but it was held that it did; for that the circumstances amounted to a tacit acknowledgment, that the deeds were deposited, with the new firm, on the same terms, as they had been with the old one.(*i*) It may, probably, now be laid down with confidence, that the continuance of the same modes of dealing with the new firm, as with the old, and the continuance of the deposit in the hands of the new firm, will be construed into a tacit recognition by the depositor, that the new hold the deeds for the like object and purpose as the old one did, and stand in the same relation to him. Nevertheless, in practice, it is desirable for bankers, in order to avoid all questions, as to whether a sufficient period has elapsed, to enable the court to say that the intention of the depositor was clearly manifested,

(*h*) *Pease v. Hirst*, 5 Man. & Ry. 88; S. C., 10 B. & C. 122. It seems probable that if the surety had called upon the bankers to apply A.'s balance, when it was in excess, to the discharge of the note, they would have been bound to do so, see per Bayley, J., 5 Man. & R. 92.

(*i*) *Ex parte Kensington*, 2 Ves. & B. 79, 83; *Ex parte Oakes*, 2 M. D. & De G. 234; *Ex parte Smith*, 2 M. D. & De G. 314; see 19 & 20 Vict. c. 97, s. 4.

and to make it quite certain that he was aware of the change, &c., to have a fresh memorandum of deposit made, purporting to secure the new firm.

To close this subject, we may mention some considerations, arising out of the proportion, which the value of the security taken, bears to the debt which it is taken to secure.

*At law, the general principle has been laid down, with respect to insolvency, that if the debt to be secured was *less* than the debt [*218] assigned, and there was nothing more than a simple assignment of the debt, as a security, in such case, the assignees of the insolvent would have an immediate interest in the sum to be recovered, from which, benefit to the creditors might result, and they would not have been bound to refund, to the equitable assignee of the debt, all they had recovered; and this being the test, at law, of the right of the assignees to sue, or not, for the debt, the right of action, in such circumstances, would vest in them. (k)

Again, if the debt assigned be equal to the debt, to secure which it is assigned, i. e., equal at the time of assignment, this does not necessarily make any difference; for if the debt secured be subsequently, and before the debt assigned has been recovered, reduced by payment or by the realization of other securities, there would be a surplus, applicable to the payment of the insolvent's general creditors, and the possibility of that surplus would vest the title to recover the debt in the insolvent's assignees. (k)

And the same seems to be the rule, at law, if the debt assigned, by way of security, were greater than the debt to be secured; i. e., greater at the time of assignment. In this case, also, as in the others, the right of action, for the debt, vests in the assignees. (k)

In equity, there appears to be no difference whatever with regard to the above points, whether the assignment is of a policy, the sum insured, whereby, is equal to, or less than the sum for which it is taken as a security, or partial security, by the bankers, or whether it is of a policy for a sum exceeding that due by the assignor to the bankers, so that it is, in fact, an assignment by way of mortgage; in either case their receipts will be discharges to the insurance office; in **neither* [*219] case can there be any interpleader. If, however, the mortgagor, after the date of the assignment of the policy, by way of mortgage, as security, satisfied the bankers, and gave notice to the insurance company that he had done so, so that the mortgage was no longer in force; in such a case, the company, other things remaining the same, might have a right to have the relative rights and claims of all parties adjusted, by the court, on interpleader. (l)

Perhaps, also, if notice be served by a provisional assignee of an insolvent, upon the insurance company, not to pay to the bank, and he pro-

(k) D'Arnay v. Chesneau, 13 M. & W. 809, 810; compare Dessborough v. Harris, 3 Eq. R. 1058; and see also per Pollock, C. B., Boddington v. Castelli, 23 L. J. (N. S.) Q. B. 33, as to possibility of surplus vesting right of action.

(l) Dessborough v. Harris, 3 Eq. R. 1058; 1 Jur. (N. S.) 986, overruling Fenn v. Edmonds, 5 Hare, 314.

ceeds to take active steps to enforce his claim to the proceeds of the policy, it might be held, that the company were entitled to the same adjustment, effected in the same way.

[*220]

*CHAPTER VII.

GUARANTEES, BONDS, ETC. GIVEN TO BANKERS.

As to guarantees, or bonds, &c., given by third parties to bankers, to secure their advances to customers, &c., it may be useful to examine various decisions, in order to perceive and note the grounds of the law on which they have rested, and the duties and rights of bankers arising out of the principles they lay down.

A., a customer of a bank, having overdrawn his account, upwards of 10,000*l.*, B. and others execute a bond to the bankers to secure, guarantee, and indemnify the latter for any sums, which, for ten years, they might advance to A. on bills drawn by him, or made payable at their house, and on all cheques, notes, orders, and other engagements of A., not exceeding the sum of 5,000*l.* in the whole, together with interest on the said sums, &c. This bond was not to affect a prior security given by A. to the bankers; but the bankers gave no notice to B. or to the other obligors, that A. was indebted to them, in the above sum, at the time of executing the bond. The bankers continued to make advances to A., who afterwards became bankrupt, and in the final close of accounts, he was indebted to them upwards of 10,000*l.* After the execution of the bond, he had paid in sums considerably exceeding 5,000*l.*; he saw the accounts every fortnight, and received vouchers half-yearly, and knew how the different payments were applied, but never made any objection, or gave any directions, as to their application.

B. was held to be liable to the extent of 5,000*l.*, but one of the learned judges gave his assent, with great reluctance, thinking it far from clear that the sureties, on executing the bond, did not intend that any fresh [*221] payments, made by A., *should go to the new account, leaving the bankers to their remedy, on the former bond, for the reduction of the old account.(a)

Change of Firm.—A guarantee, given by a person to secure a banking copartnership, consisting of several members, all and every sums or sum of money which might become due to *them*, from a certain customer, for money advanced to him, &c., upon any bills, &c., made payable at

(a) *Williams v. Rawlinson*, 3 Bing. 71; and see S. C., as to stamp. When the customer and another person join in a bond conditioned for the payment of all sums advanced or to be advanced to the customer, the bankers may nevertheless sue the customer for the balance, as on a debt by simple contract, there being no merger, the parties to the bond not being those between whom the original liability arose. *Holmes v. Bell*, 3 M. & Gra. 220.

the banking house of the copartnership, does not bind the obligor, after the death of one of the partners, nor cover future advances made, after such death, and the taking in of another partner; and the customer who, at the time of the death, was indebted to the house, having afterwards paid off the balance incurred previously to the death, the obligor was wholly discharged.^(b)

There is no doubt, however, that a guarantee may be drawn, in such terms, as will serve as a continuing indemnity to the house, whatever be the change of partners; but then that must plainly appear from the language used; ^(c) the courts, both of equity^(d) and common law^(e) appear to lean against increasing the liability of a guarantor to a banking firm *in this respect*. This principle of construction, *narrowing the liability of a surety, applies quite as strongly, from the nature of [^{*222}] it, when the advances to be secured are to be made to a firm; for it is obviously an assumption to conclude, that a party guarantees advances to A., B. and C.

And since the decisions, which established this principle, the legislature appears to have ratified and confirmed it, by enacting, as follows:—^(f)

“No promise to answer for the debt, default, or miscarriage of another, made to a firm, consisting of two or more persons, or to a single person, trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm, consisting of two or more persons, or of a single person, trading under the name of a firm, shall be binding on the person making such promise, in respect of any thing done or omitted to be done, after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties, that such promise shall continue to be binding, notwithstanding such change, shall appear, either by express stipulation, or by necessary implication, from the nature of the firm, or otherwise.”

Since this statute, therefore, guarantees of this sort may either expressly stipulate for the continuance of the undertaking, (when the intention is that it should continue,) notwithstanding changes in the firm; or if the parties choose to take, upon themselves, the risk of determining that the firm is of such a nature, as necessarily to imply the continuance of the guarantee, notwithstanding the change, &c., they may do so, and need not insert an express provision to that effect; and so they need not insert an express provision, if they choose to incur the risk of proving

^(b) *Strange v. Lee*, 3 East, 484; and see acc. *Weston v. Barton*, 4 Taunt. 67; where larger words were used, see *Bodenham v. Purchas*, 2 B. & A. 39; *Dry v. Davey*, 10 A. & E. 30.

^(c) See form in *Earle v. Oliver*, 2 Exch. 71, 72, and stat. 19 & 20 Vict. c. 97, s. 4, *infra*, p. 222.

^(d) *Pemberton v. Oakes*, 4 Russ. 154; see 3 Q. B. 721, 722.

^(e) *Chapman v. Beckinton*, 3 Q. B. 703; see 6 *id.* 526. A counter promise by the customer, even when made after fiat and before certificate in bankruptcy, that if the surety be called upon to pay the sum guaranteed, the customer, when able, will repay it, may be supported. See *Earle v. Oliver*, 2 Exch. 71.

^(f) 19 & 20 Vict. c. 97, s. 4.

aliunde, this to have been the intention; but it is manifestly the safe and most *convenient course, in all cases, to insert an express [*223] stipulation for the continuance of the instrument, notwithstanding any change, &c.

The following examples of decisions on this subject will be useful.

One Teed, gave to a banking-house a guarantee, on behalf of a firm, expressed as follows:—

“I hereby agree to guarantee to you the repayment of any bills you may honour, to be drawn upon your house by the firm of Carruthers & Co., of Manchester, distillers, and any advances you may make for the said firm of Carruthers & Co. from time to time, not exceeding the sum of 8,000*l*. This guarantee to extend to any current amount or ultimate balance not exceeding the sum of 8,000*l*. and interest, and to continue in force for one year from the date hereof.

“THOMAS TEED.”

This was dated, London, June 29, 1839.

One of the firm of Carruthers & Co., having retired from business, a second guarantee was given, thus expressed:—

“Notwithstanding Mr. John Carruthers has retired from the partnership of Carruthers & Co., of Manchester, distillers, and which business is now carried on by Mr. Frederick F. Carruthers, under the said firm, on his own account, I do hereby agree, in consideration of your giving credit to and honouring the drafts of the said firm of Carruthers & Co., to continue the guarantee given by me to your house for the sum of 8,000*l*. for and on behalf of the said F. F. Carruthers alone, upon the same terms, condition and period as expressed in the guarantee given by me to your house, when the said John Carruthers was a partner in the said business. This guarantee for the said F. F. Carruthers to extend to any current amount or ultimate balance not exceeding, as to my liability, the sum of 8,000*l*. and interest, and only to continue in force for the same period as mentioned in my former guarantee.

“THOMAS TEED.”

This was dated, London, 27th January, 1840.

During the year, to which the latter guarantee was limited, various payments were made by the bankers to the firm, and four bills of exchange, of different dates, amounting, together, to the sum of 1,975*l*. were drawn by Carruthers & Co., payable at the banking-house, and accepted by the bankers. On March 14, 1840, after the acceptance of the four bills, and before any of them were due, one of the partners in the banking-house died, there being, at that time, a balance *(exclusive [*224] of the four bills) of 124*l*. 18*s*. 7*d*. due from the bank to Carruthers & Co. on their account.

After the death of the partner in the bank, the same course of business was continued between the bank and the firm; but on June 15, 1840, Teed gave the bank notice that he withdrew his guarantee. On July 15, 1840, the firm of Carruthers & Co. became bankrupt.

The following points were decided on these facts:—

1. That the guarantee ceased, upon the death of the partner in the bank, within the period for which the guarantee extended.

2. That bills, accepted by the bank, before the death of the partner, were within the guarantee, though they were not payable until after that event.

3. That the amount guaranteed could not be increased by any act of the remaining partners, after the death, and the customer; although such amount might be diminished by such act.

4. That, in the construction of the particular terms used in this guarantee, it could not be held that the amount guaranteed, in respect of the bills honoured by the bank, was to be reduced, by the balance due to the customer from the bank, when the guarantee ceased, such balance having been afterwards paid, in the course of business, between the bank, after the death of the partner, and the customer.(g)

Where three persons carried on business, as partners in banking, the partnership being to expire 19th February, 1807, according to the articles, dated 5th January, 1792, which empowered one of the firm, in case of his death during the term, to bequeath his share, in the partnership, in favour of his wife and children. That partner died, 26th March, 1802, having bequeathed his share, &c., to executors, in trust, &c., accordingly. The business continued to be carried on under the same firm as before; and the executors interfered in the management, and shared in the profits. Before the death, a customer and two other persons, of the one part, and the members of the banking partnership, [*225] of the other part, executed an indenture, dated 4th January, 1802, by which the parties of the first part did jointly and severally covenant to pay to the bankers, the survivors, or survivor, of them, &c., upon demand, all sums of money not exceeding 20,000*l.* in the whole, which then were, or should at any time thereafter, before and until 19th February, 1807, become due and owing from the customer to the parties of the second part, or to the survivors, or survivor, of them, &c., either for principal money then already lent and advanced, or thereafter, within the time aforesaid, to be lent and advanced, or for interest then due or to become due thereon, or for money then already paid or lent, or thereafter, within the time aforesaid, to be paid or lent, &c.

At the time of the death, the balance against the customer was upwards of 14,000*l.*; after the death, the customer continued his dealings with the bank, as before, and, within a few weeks after, paid in more than 14,000*l.*, but within the same period, drew out a larger sum. These subsequent dealings were entered in the same account current with the preceding dealings, under the same heading, &c.

In February, 1806, the customer stopped payment, being indebted to the bank in upwards of 19,000*l.*

Here it was held, that the banking partnership, which carried on business after the death of one of the partners above mentioned, was a new partnership; and, therefore, that the surety's covenant did not

extend to cover sums advanced by such new partnership; and, that the balance due to the bank by the customer, at the time of the death, must be considered to have been discharged, by the subsequent payments made by him to the bank.^(h)

[*226] **Variance in Agreement.*—The general rule is, that any variance in the agreement, to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, even though the original agreement may, notwithstanding such variance, be substantially performed, will discharge the surety.⁽ⁱ⁾

Thus, a bond given to secure certain bankers, in London, against all debts that might be incurred by a firm of bankers, in the country, their correspondents, and executed by the two persons composing that firm, and a third person, as their surety, whereby the three jointly and severally bound themselves to repay, &c., such sums as should be advanced by the London bankers, to meet bills, &c., drawn by the said two persons, "or either of them," was held not to extend to bills, &c., drawn, by one of the two, after the death of the other.^(k)

But, if a bond be given to bankers, to secure them against further advances, so that these further sums, together with those already advanced, should not exceed, 5,000*l.*; and, notwithstanding, the bankers advance to a greater amount; that will not be construed to operate as vacating the obligation; for the contract is not to be taken as a prohibition of all subsequent advances, but only as a qualification of the surety's liability;^(l) express and clear provisions ought to have been introduced to effect that object;^(l) and in an action (by the assignees of two of the firm of bankers, to whom the bond was given,) on it, to say that, after the making of it, the partnership, to whom it was given, was dissolved, and a new partnership entered into by the two and a third person, and the balance due to the old firm was transferred to the new one, is a bad plea; and the surety is liable to the assignees.^(l)

[*227] **Continuing Guarantee.*—If the guarantee, reciting, in the condition, an agreement by the bankers to discount bills of exchange, and otherwise pay, lend and advance to the customer, if he should have occasion, any sums of money not exceeding, at any one or more time or times, 200*l.* in the whole, undertakes to pay to the said A., B. and C. (the bankers,) "and all and every other person or persons who

(h) *Pemberton v. Oakes*, 4 Russ. 154. See, in case of incoming partner, *Brooke v. Enderby*, 2 Bro. & B. 70; and where the security was given by a banking firm, and one of the partners dies, *Bank of Scotland v. Christie*, 8 Cl. & F. 214.

(i) *Bonar v. Macdonald*, 3 H. Lds. 226; see *Stewart v. M'Kean*, 10 Exch. 675; *Newton v. Chorlton*, 2 Drew. 333, 339; *Woodcock v. Oxford Railway Company*, 1 Drew. 521.

(k) *Simson v. Cooke*, 1 Bing. 452.

(l) *Seller v. Jones*, 16 M. & W. 112; *Parker v. Wise*, 6 M. & Selw. 247, 250; see *Jones v. Clarke*, 3 Q. B. 194. There need not be, in a guarantee, a clause reserving a power of revocation, for that is incident; S. C., *ibid.* 201, 203; so *Mason v. Pritchard*, 12 East, 227. But this seems to be true only of a guarantee *not under seal*; see 2 Mau. & S. 370; *Calvert v. Gordon*, 1 Man. & R. 506; S. C., 3 id. 124; 2 Sim. 235, 4 Russ. 581; see *Hough v. Wair*, 1 Car. & P. 151.

shall or may become partner or partners with them in the said banking business, or any or either of them, or other the firm of the said house for the time being, &c., all and every such sum and sums of money, not exceeding the sum of 200*l.* as aforesaid, as the said A., B. and C., or any or either of them, or any future partner or partners of the said firm, or other the firm of the house for the time being, should advance or pay," &c., this is a continuing guarantee to any future firm, and not merely limited to the first occasion on which the advances reached 200*l.*, but extended to future advances.^(m)

In this respect—that is, in respect of the amount—the courts do not lean towards the side of the guarantor; for, when the question is whether the guarantee is qualified or continuing, and the construction, that it is a continuing one, can be put upon the words, it will be.⁽ⁿ⁾

There may be, however, a guarantee on which the surety or guarantor shall only be liable to the given amount once; so that, if 200*l.* have been advanced, and 200*l.* paid off, he is no longer liable for any thing.^(o)

In a continuing limited guarantee, given to the National *Provincial Bank, there was a proviso, that, if the creditors received [*228] a dividend, from any estate of the principal, (the customer,) it should not be taken in discharge of the guarantee, but that the creditors should be entitled to recover, on the guarantee, to the full extent of the limit, notwithstanding.

On the bankruptcy of the principal, the creditors proved, and, before receiving any dividend, obtained payment, from the guarantors, to the extent of the limit.

The guarantors were considered not to be entitled to stand in the place of the creditors, as to so much of the proof as was equal to their payment, the creditors not having yet, at the time of the application, been paid in full.^(p)

In a case where merchants procured accommodation from their bankers, on entering, with sureties, into a covenant to pay the floating balance due from time to time, up to a certain limited amount, subject to a proviso that, in the event of the merchants' bankruptcy, and in the event of the amount due, at that time, exceeding the fixed limit, any dividends received, under the bankruptcy, should be applied exclusively in payment of the excess, without the sureties being entitled to any part of the dividends, until the whole of such excess was paid. Some of the sureties obtain a counter security, in respect of their liability, &c., without notice to the bankers. The merchants fail, being indebted to the bankers beyond the fixed limit; the latter receive dividends on the whole debt, and recover the amount secured, from the sureties: the bankers were held to be entitled to retain the whole sum so received, although two of the sureties prove, under their counter security, and, in effect, are paid in full out of the bankrupts' estate.^(q)

^(m) *Batson v. Spearman*, 9 A. & E. 298.

⁽ⁿ⁾ See *Mayer v. Isaac*, 6 M. & W. 612; see also 12 East, 228, and the judgments in *Hitchcock v. Humfrey*, 6 Sc. N. R. 540.

^(o) *Kirby v. Duke of Marlborough*, 2 M. & Selw. 22.

^(p) *Ex parte Miles*, De G. Bank. R. 623.

^(q) *Ex parte Hope*, 3 De G. M. & G. 720. In general, in the absence of stipula-

[*229] **Merger.*—Bankers take a bond, entered into jointly and severally by four partners, and two sureties for them, payable immediately, to secure the payment of all such sums of money as, upon the balance of any account current, between the partners and the bank, shall, from time to time, be due by the partners, to the extent of 1,000*l.* The bankers signed separate judgments (having also taken a warrant to confess judgment) against the obligors: but it was, nevertheless, held that, on the bankruptcy of the partners, they were not bound to prove, on the separate judgments, against each of the bankrupts, but that they might prove against the joint estate, for any balance that might be due within 1,000*l.*

The bond here was not taken, it will be observed, for any existing simple contract debt; if it had, there would have been a merger in the bond; and then the bond debt would have merged in the judgment.

So, where the original contract is a joint one, and the creditors take a joint and several bond from the debtors, and then enter a joint judgment on the bond, there is a merger of the bond; and there could be no right to prove against the separate estate.

But the difficulty, in respect of the above firstly mentioned bond, is, that it is not the joint obligation of the bankrupts alone, but of them and two other persons, who must be presumed to be alive; and the rule is clearly established, that you cannot prove against the bankrupts, if the surety be alive and solvent.

It is to be observed, the bank was the creditor, but, in fact, the bond was given to two persons, as trustees for them, it was, therefore, a collateral security, and did not merge the joint simple contract; it is a bond from the six to the two, conditioned to be void, upon payment, by the four to the two.(*r*)

A joint-stock banking co-partnership took a joint and several bond, given to two trustees for them, from several *persons, viz., the [*230] four members of a trading firm, and two other persons, purporting to secure, to the bank, all and every such sum of money as, upon the balance of any account current, which then was, or at any time or times thereafter should be open between the trading firm and the bank, at any of the establishments of the bank, should from time to time be due, and owing from, or by the trading firm, their executors, &c., together with all discount, postage, and commission, according to the usage and course of business; but, nevertheless, to the extent only of 1,000*l.*, principal money, exclusive of interest and costs, in case such balance should exceed that sum. The bank was to be at liberty to recover that sum, though accounts had been settled between the parties, and balances had been paid before the bank proceeded on the security; and there was a warrant of attorney, for entering up judgment, on the bond, in order the better to secure the advances which should be made. The bank entered up six several judgments against the obligors of the bond,

tion to the contrary, a surety paying the debt is entitled to all the securities held by the creditor as against the debtor; see *Ex parte Stokes*, De G. Bank. R. 623, and cases cited.

(*r*) *Ex parte Banks*, 2 Jo. & L. 212.

and the traders having become bankrupt, the question was, whether for the balance of the account, as it stood, at the date of the bankruptcy, the bank was at liberty to prove against the joint estate of the traders, as for a simple contract debt; and it was decided that the bank might do so, the original liability not being merged, or barred by the bond, or judgments, for the bond was not conditioned, for any payment, to be made by the six persons to the two persons to whom the security is given, but was a bond, from the six to the two, conditioned to be void, upon payment, by the four to the bank, and was therefore only further and collateral security.^(s)

Time given to Principal.—It may be laid down, apparently without qualification, that where a joint and several bond is taken, by way of security, that time, or indulgence, *has been given by parol to the principal debtor, is no answer, *at law*, on the part of an ob- [*231] ligor, who has executed the bond as surety; ^(t) the remedy, if any, is to be sought in equity.^(u)

Where, however, there has been an absolute release, by the obligee, to one of two joint and several obligors, both are discharged; also, if the obligee releases to one obligor, and the other, in consideration of the forbearance, undertakes to pay the debt, the debt, nevertheless, is absolutely discharged.^(x)

Such a transaction as the following may be mentioned, as one that affords a warning to bankers, taking securities, for advances.

If A. is persuaded to execute covenants, for repayment of a loan, to a borrower from the bank, in the expectation and on the faith that B. will also execute it and become a co-surety, jointly and severally responsible with himself and the borrower, and B. never, in fact, executes the deed, but the money is, in fact, advanced, and no notice of B.'s failure to execute is given to A., until the principal debtor has made default and become insolvent, A., in equity, is discharged from all liability, and will have the bond given up to him to be cancelled.^(y)

In fact, a principal point with regard to guarantees, taken by bankers, which it behoves them to attend to, is that "*giving time*," as it is called, *to the principal debtor, without assent of the surety, discharges the surety*; that is, if the principal is indulged, with more time, in which to discharge his debt, than is according to the known course of dealing between the parties, or the legal obligation of the debtor in the circumstances, then, provided that indulgence *does not arise out of mere inactivity on the creditor's part, but arises out of a binding [*232] contract, which prevents the creditor from being in a condition to sue, for a given period; that lets off, or discharges the surety, and relieves

^(s) In re Clarkes, 2 Jo. & L. 212; compare Ex parte Christie, 2 Deac. & C. 155; Holmes v. Bell, 3 Scott, N. R. 479.

^(t) Davey v. Prendergrass, 5 B. & A. 187; Bulteel v. Jarrold, 8 Price, 467; Trent Navigation Company v. Harley, 10 East, 34.

^(u) Parker v. Watson, 8 Exch. 410.

^(x) Parker v. Lawrence, Hob. 70; Co. Litt. 232, n. (26).

^(y) Evans v. Brembridge, 25 L. J., Ch. 102, overruling Ex parte Gifford, 6 Ves. 805.

him from all liability to the banker, to whom he has guaranteed his principal.(z)

W. Jones gives the following guarantee, to a bank, on behalf of Henry Bowers :—

HENRY BOWER'S MILL ACCOUNT.

"Please to open an account with, and honour the cheques of, Mr. H. Bowers on 'mill account,' for whom I will be responsible.

" *Carmarthen, January 4, 1825.*

W. JONES."

W. Jones was an attorney, and the professional adviser of the bankers, and, at the time, had a banking account with them. The bankers, upon receiving the above document, opened an account with Bowers, and made various advances to him up to February, 1827, when they ceased to advance to him. It was the course of business, of the banking house, occasionally to take the acceptances of their customers, for the balance appearing to be due, on the face of their accounts, which were termed *covers*; and the same was also shown to be the practice of a neighbouring bank. Jones was proved to have sometimes been consulted by the bankers, as their professional adviser, with respect to these acceptances; but it was not proved that he had personally any knowledge of the practice to require these bills, as covers, for overdrawn accounts.

In February, 1828, without Jones's knowledge, or consent, the bankers took Bowers's acceptance, at three months, for 846*l.* 14*s.* 7*d.*, the amount of their balance against him; and this bill was carried to the credit of his account, but was dishonoured, at maturity.

In 1832, the bankers became bankrupt, and in an action, *by [*233] their assignees, against Jones, commenced in 1833, it was adjudged, that the bankers, by taking the above acceptance, had given time to Bowers, the principal, and thereby had discharged Jones, the guarantor or surety.(a)

It is not necessary, for the bankers, who are taking the guarantee, to make any statements how the account has been kept; whether the customer has been in the habit of overdrawing; whether he was punctual in his dealings; whether he performed his promises in an honourable manner; *unless questions be particularly put, by the surety, to gain information on these points*, on all which, it is material for him, not to be in the dark; if questions are put, the bankers must, of course, answer correctly; otherwise, it would probably be found, that the guarantee would be ineffectual.(a)

A guarantee was given by a person to the Craven Bank, to secure all

(z) *Samuell v. Howorth*, 2 Meriv. 278; confirmed, *Creighton v. Rankin*, 7 Cl. & F. 346; *Heath v. Key*, 1 Y. & J. 434; see *Blake v. White*, 1 Y. & Col. Ex. Eq. 423; *Badnall v. Samuel*, 3 Price, 534, 535.

(a) *Howell v. Jones*, 1 C. M. & R. 97; see *Small v. Currie*, 2 Drew. 102, 114. To impeach a guarantee, on the ground of concealment of material facts, such concealment must be shown to be fraudulent, *North British Insurance Company v. Lloyd*, 10 Exch. 523, 533; see *Railton v. Matthews*, 10 Cl. & F. 934; *Hamilton v. Watson*, 12 Cl. & F. 100; *Smith v. Bank of Scotland*, 1 Dow. 272; and per *Alderson, B.*, 10 Exch. 529; *Owen v. Homan*, 3 Mac. & G. 378; *Price v. Barker*, 4 E. & B. 760.

sums then due, or which might become due, from a customer, to the extent of 1,000*l.*, providing, that if the guarantor should give notice, in writing, to the bank, determining the guarantee, he should be liable only to the extent aforesaid, for the amount due, at the time of giving notice, but not for any money advanced, or liability incurred, by the bank, subsequent to such notice.

The date of this instrument was 14th February, 1850.

The customer, subsequently, when the balance against him reached 1,000*l.*, and on a further advance, by the bank, of 300*l.*, executed a warrant of attorney to confess judgment for 2,600*l.*, subject to a defeasance, on payment of the floating balance of his account, not exceeding 1,300*l.*, and with a proviso that the guarantee, given as above mentioned, should not, in any manner, be prejudiced, or affected, by the warrant of attorney.

*The date of this instrument was 19th March, 1851, and con- [*234] temporaneously an agreement was signed, by the customer, the guarantor and the bankers, whereby it was agreed that the memorandum of guarantee of 14th February, 1850, should not be, in any manner, prejudiced, or affected, by the execution of the warrant of attorney, or by any judgment to be entered up, and execution issued thereon, and that all moneys recovered, under the warrant of attorney, should be first applied in reduction of the balance of the banking account, of the customer, remaining due at the time of levying the execution, before the memorandum of 14th February, 1850, should be capable of being performed, or satisfied, by the guarantors, either wholly, or in part, to the end and intent that the guarantee should remain effectual to the extent of 1,000*l.*, after judgment should have been entered up on the warrant of attorney, and execution levied in pursuance thereof, and the proceeds of such execution placed to the credit of the customer's account. And it was further agreed, "that for the privilege, or protection, of the guarantor, in addition to the proviso contained in the memorandum of 14th February, 1850, for discharging him from continuing his responsibility, on his giving notice, to the bank, or his desire to be so discharged, the bank should, on being required to do so, in writing, by the guarantor, although such requisition should, in nowise, be necessary as between the bank and the customer, enter up judgment on the warrant of attorney, and levy execution against the goods and chattels of the customer, as soon as practicable, and apply the proceeds of such execution, in reduction of the balance of the customer's account.

The warrant of attorney was not filed pursuant to the stat. 12 & 13 Viet. c. 106, s. 136.

On 24th March, 1851, judgment was entered up on it.

On 25th August, 1851, the guarantor, by notice, in writing, required the bank to levy execution; this was done, and goods sold under it, to the amount of the debt, due from *the customer to the bank. [*235] Shortly after the customer became bankrupt, and the assignees recovered back, from the bank, the amount levied under the execution, by reason of the omission to file the warrant of attorney, or a copy of it, according to the provisions of the above statute. The bank then proved

under the bankruptcy, and having received two dividends, of 7s. 6d. and 8d. in the pound respectively, on their debt, they brought an action, against the guarantor, on the guarantee; but it was held, by the lords justices in equity, that the agreement to issue execution was valid and binding, but that, *by the omission to file the warrant of attorney*, the guarantor was discharged; the guarantor, however, having pleaded to the action, and then filed a bill, to stay proceedings in that action, and so put the bank to unnecessary costs, could only have a stay of proceedings, on the terms, of paying the costs at law, subsequent to the declaration. (b)

A customer, having overdrawn his account with his bankers, on their requiring security from him, deposits with them certain title deeds, and prevails on A. to join him, as surety, in a promissory note for 400*l.*, payable in twelve months, to the bankers. Soon after that note became due, the customer and A. gave the bankers another *joint* note at twelve months, dated 14th April, 1813, in exchange for the note, which had become due, and the customer still kept a running account with the bank, and, in the course of that twelve months, paid in very large sums. In January, 1815, the customer entered into a composition deed with his creditors, whereby his debts were compounded for ten shillings in the pound. The last note was stated to have been given, with an express understanding, that the surety would not be answerable for a longer period than the twelve months. Between the giving of the note and the date of the composition deed, the surety never had any application, made [*236] to *him, respecting the note; but, in 1816, a person, to whom the promissory note had been indorsed, for the first time, demanded payment of the surety, who took no notice of the application. Several months afterwards, the note having been returned to the bankers, they sued the customer: and the court held, that he *was not discharged*; for that the *onus* lay on him to take care that the note was satisfied; that his situation had not been changed to his prejudice; that the composition was for his advantage, to the extent of ten shillings in the pound, as much as if the bankers had received so much from him in part payment, and that the time that had elapsed, and the want of earlier notice, made no difference. (c)

A promissory note is made jointly by A. and B., to secure, to a bank, the payment of advances made, by them to A., to the extent of 250*l.* The note was made payable at one month. After it became due, and without the privity of B., it was agreed, between A., and the bankers, that A. should execute a warrant of attorney to a third person, as trustee for the bank, to secure the amount of the note, and of a further advance, made by the bank, to A.

In such case, the note does not merge in the warrant of attorney. (d)

Also, the acceptance, by the bank, of the fresh security, without any

(b) *Watson v. Allcock*, 4 De G. M. & G. 242; see *Acraman v. Herniman*, 20 L. J., Q. B. 355; see also *Parker v. Watson*, 8 Exch. 404.

(c) *Perfect v. Musgrave*, 6 Price, 111; in this case, *Rees v. Barrington* was cited for defendant; see inf. 243.

(d) *Bell v. Banks*, 3 M. & Gra. 258.

binding engagement by them to give time to A., does not discharge the surety B. ^(d)

Here, it will be observed, the warrant of attorney was not between the same parties as the original liability.

On April 25, 1803, a customer, together with another person, executes a joint and several bond, to his bankers, to secure to them the repayment of the sum of 1,000*l.*, (advanced by them to the customer,) with interest, on the 25th April, 1804.

*At the date of the bond, the customer's account with the bank, exclusive of the above sum, advanced, showed a balance [*237] in his favour; he also paid money, into the banking house, after that date, and before 25th April, 1804. At the end of 1804, the customer's account, independent of the 1,000*l.*, (which was not repaid,) was overdrawn. In January, 1807, a settlement of accounts took place, between the customer and the bankers, when 2,259*l.* was found to be due from him to them, the whole of the 1,000*l.* secured upon the bond, being treated, on occasion of this settlement, as a debt remaining due from him.

The bankers then agreed to give him time for payment, on his giving security, for the whole balance; and on January 23, 1807, he executed a warrant of attorney to the bankers, to confess judgment against him, for the payment of the 2,259*l.* by instalments, several of which he paid, but became bankrupt before the whole was discharged, a sum of 1,100*l.* remaining still due.

It was proved, that the surety was privy to the above-mentioned settlement of accounts, and to the facts respecting the warrant of attorney.

On these facts, it was considered, the surety was not discharged, by the time given to the customer, and that the bond was not discharged, by the payments made by the customer, before it became due, &c., for these were to be considered as made on, and applicable to, the banking account, and the bankers, being entitled to hold the bond and warrant of attorney, as distinct securities. ^(e)

But where bankers took a bond, from a customer and his surety, by which it was stipulated that the surety was to be liable, only to the extent of 6,000*l.*, if upon the account that amount should be due, and subsequently, the balance of the customer's account appearing to be 9,500*l.* against him, the customer gave the banker a mortgage for 4,000*l.*, and it *was agreed, between them, that the residue should be paid [*238] by instalments; and the customer, also, gave a warrant of attorney to confess judgment for the residue, *expressly without prejudice to any other securities held by the bankers, for the said sum, or any part of it*: there it was said, that it may, in many cases, be a very rational provision, that the principal shall have time, provided he can have it without prejudice to the remedy against the surety, which, though worth nothing at present, may, in a year's time, be very valuable, and the creditor

(d) Bell v. Banks, 3 M. & Gra. 258.

(e) Tyson v. Cox, Turn. & R. 395; and see S. C., as to counter indemnity to surety; and see Boulton v. Stubbbs, 18 Ves. 20.

may, very reasonably, mean to secure the benefit of that contingency; but the bankers were, nevertheless, restrained from suing the surety.^(f)

Where parties are acting by virtue of an act of parliament, to which every one must be considered as subscribing, and there are provisions, opposed to the supposition that those to whom the guarantee is given have the power of delaying to put in suit the instrument, against the surety, upon a breach occurring, and they do, nevertheless, lie by and indulge the principal, though not by means of a binding contract, still the surety will be absolved.^(g)

How to take Guarantee.—It is indispensable, in order that bankers should obtain the benefit of the securities they take, for them to act, not merely with perfect openness and candour, but with vigilance and circumspection. Many suppressions and unintentional misrepresentations carry with them the effect of fraud, both at law and equity, and, in consequence, will invalidate transactions otherwise unquestionable; much more has wilful concealment of facts, obviously material for the surety to know, previously to his entering into the contract, the effect of fraud, that is to say, it will vitiate the whole transaction, as regards the bankers' [*239] *power of recovery from the surety. The following case supplies an instance of the former proposition.

Certain bankers advanced 2,600*l.* to A., upon the security of an indenture of mortgage to them, of certain property of A., and also of a joint and several promissory note of the same date as the deed, in which a third party joined with A. as surety. At the time of this advance, A. who had long been a customer, owed them 800*l.*, and it was arranged, between him and the bankers, that this sum should be deducted from the 2,600*l.*, but neither by the recital in the mortgage deed, nor otherwise, was the surety apprised that such was the case, and that recital, moreover, expressly, but falsely, stated, that the entire interest in a 1,500*l.* policy of insurance, already deposited with the bankers, would be available, as collateral security, for the 2,600*l.*, inasmuch as the 800*l.* had been repaid to the bankers. The mortgage deed was prepared by the bankers' solicitor, and read over in his office, to the surety and A., previously to its execution, and to the surety's signature, of the promissory note. The circumstances were held to constitute such a fraud in law, as released the surety,^(h) although it was not suggested, at the bar, that any intentional fraud was imputable to the bankers personally.

The following is a case in which the neglect of the bankers operated to release the surety.

Richard Cox was a banker, in co-partnership with Messrs. Morrell, under the firm of Cox and Morrell. He was also engaged in collieries, with one Davies, under the firm of Cox and Davies.

Cox and Morrell were in advance to Cox and Davies.

Richard Cox, having applied to his partners for a further advance, it

(f) *Boulthée v. Stubbs*, 18 Ves. 20; see 4 E. & B. 773, and 6 Dow, 238. See as to terms of restraining the action, *Dawson v. Lawes*, 1 Kay, 299.

(g) *Bank of Ireland v. Beresford*, 6 Dow, 233, 239.

(h) *Stone v. Compton*, 5 Bing. N. C. 142; see 3 B. & C. 605; 3 T. R. 551.

was agreed they should advance a further sum, upon his brother John Cox, becoming security for the repayment of 3,000*l*.

*John agreed, as surety for Richard, to execute a joint and several bond to James and John Morrell, for the sum of 3,000*l*, [*240] upon having a counter bond, for the like sum, from Cox and Davies, to indemnify him.

A joint and several bond was executed by John, but not by Richard; the counter bond was given by Cox and Davies, and further advances were made by the bank.

Sometime after this, Richard ceased to be a partner in the bank.

The bankers were considered to have released the surety, by neglecting to obtain the bond, from the principal debtor, Richard Cox.

John Cox also joined with Richard in signing promissory notes to Cox and Morrell, each of which was expressed to be for value received, by a draft, at the three months's date, to enable Richard to meet some bills.

John signs, as surety merely, and becomes liable upon the words of the notes, on a contract, whereby Cox and Morrell were to advance the money, upon three months' credit. But the advances of money were actually made, not by drafts at three months, but directly, in cash, within that time, and in such a way as to give the bankers, upon each advance, an immediate demand against the principal debtor. Thus, the right of the creditor was rendered materially different, as against the principal, from what it was intended to be, by the surety.

Therefore, in this case also, they released the surety; and it makes no difference, that they voluntarily forbear, to demand payment, during the three months.(i)

Another instance of a release of surety, *by the bankers' conduct*, is the following.

A surety joined, with a customer, in a joint and several promissory note for 500*l*., payable to the bankers, on demand, with interest. This note was made about 1st January, 1838, *and handed to the bankers, but was not, at that time, entered in their books; and [*241] it was not until 9th December, 1841, that the 500*l*. was placed to the credit of the customer's account; on that day it was so placed, but as of the date, 12th November, 1841, at which date, the balance appearing against the customer was about 96*l*.

In 1843, the customer became insolvent, being indebted to the bank, in a sum exceeding 500*l*.

It appeared in evidence, that the contract was, that the promissory note should be deposited, as a security, for the amount due, from the customer, on the open account; it was kept among the securities of the bank, in the first instance, but subsequently, as above stated, was entered in the books of the bank, and in the customer's pass book. Now, these latter proceedings evidently altered the position of the surety; they were not according to the contract, but an entire violation of it; instead of

(i) *Bonser v. Cox*, 4 Beav. 379; *S. C.*, 6 Beav. 110; see *In re Plummer*, 1 Phill. 56; *Ex parte Bowden*, 1 Deac. & Chit. 135.

being liable for a floating balance merely, the surety was made at once liable for the whole 500*l*. This was a release of the surety.^(k)

The following is a case, in which the steps, taken by the bank, were considered *not to have released* the surety.

A. and B. enter into a joint and several bond to guarantee a banking company, which bond, reciting that B. had requested the company to accept and discount notes, drafts and bills of exchange for him, and also to lend and advance to him such sums of money as he might require to carry on his business, and also to keep a cash and running account with him, &c., declared the condition to be, that if either A. or B. should pay, to the company such sums as should become due, on the above respects, the bond was to be void.

Sometime after the execution of the bond, the company, by deed, "remised, released and for ever discharged the customer, B., of and from all [*242] manner of action, causes of action, *suits, debts, dues, sum and and sums of money, claims and demands whatsoever, at law and in equity," with proviso "that nothing in the deed contained should prevent the company from suing or prosecuting any person who is, jointly or severally, bound with B. in any bond," &c., and stating it to be understood and agreed that the deed should not operate or be pleaded in bar, or as a release.

This deed was executed, without the knowledge or consent of A., the surety.

Nevertheless, the deed was held not to operate to discharge A.; to operate not as a release, but merely as a covenant not to sue B., the customer; and that A. was liable, in regard to breaches, accruing before the execution of the deed.^(l)

Again, an arrangement with the customer, by which the bankers intend to secure themselves, may, if unknown, or withheld from the knowledge of the guarantor, frequently defeat the object of the guarantee altogether. Thus, if a banking company agree, upon receiving the guarantee of a particular person, they will advance a certain sum, for the purpose of securing, to the creditors of a trader, a composition of ten shillings in the pound, and of enabling the trader to carry on his business, and at the same time, being themselves creditors of the trader, enter into a secret arrangement with him and others, purporting to secure to themselves repayment of the difference between the composition and the full amount of his debt to them, that is a fraud, upon the guarantor and upon the creditors, who execute the composition deed releasing the trader on the faith of the ostensible agreement, and the guarantee will be set aside in equity.

If, in such case, there be several guarantors, and on the construction [*243] of the terms of the memorandum of guarantee, there is no right of contribution among them, any one of them *may sustain a

(k) *Archer v. Hudson*, 7 Beav. 551, 564; affirmed *Ld. Chanc.* 15 L. J. (N. S.) Ch. 211; see *Bonser v. Cox*, 6 Beav. 110.

(l) *Price v. Barker*, 4 E. & B. 760, where a great number of cases are reviewed. See as to surety recovering from principal, *Kearsley v. Cole*, 16 M. & W. 128; and see 4 H. Lds. 1011.

bill in equity, to set aside the guarantee for fraud, without joining the concurrent guarantors.^(m)

And, although there might be no *fraudulent* concealment of the arrangement between the bank and the customer, yet, on grounds of public policy, the banker would be prevented from retaining his security, in addition to the amount of the composition, upon the customer's original debt to him.⁽ⁿ⁾

Bankers, in taking guarantees, ought to be careful to observe the principle which has been laid down by the House of Lords, which is this—although a creditor may not, in every case, be bound to inquire into the circumstances under which a third person becomes surety to him, he is so, when the dealings, between the parties, are such as to lead to suspicion of fraud.^(o)

It does not, however, follow from anything said above, that in no circumstances can a banker give time to a principal, in case of guarantee, from a third party; on the contrary, it is a general rule that a creditor may give time to a principal debtor, without prejudicing his right against the surety, provided he expressly reserves such right; circumstances, however, may prevent that rule from having effect,^(p) and hence it is always perilous, though, perhaps, not unusual, for bankers to indulge a customer, in such circumstances, with a little delay; it ought never to be done, without first ascertaining, that the circumstances are such, as to make it a safe course to adopt, without endangering their claims upon the surety.

Compositions, &c. with Creditors.—Compositions with creditors frequently give occasion to consider, whether a bank, by becoming a party to the deed of composition, may *not release a guarantor of advances, made by them, to the debtor. The following case is [*244] an illustration of this:—

A. executes a deed to a joint stock banking copartnership, by which he covenants to guarantee the bank from all loss or damage, &c. that might arise, &c. to them, on the account of a firm of B. & Co., with them.

When the bank sues A. on this covenant, he pleads that one H., then being a member, partner and shareholder in the said banking copartnership, and being also duly authorized by the banking copartnership, had, after the debt had become due to them, from B. & Co., for himself and for the said copartnership, executed, &c. the composition deed, acquitting the said B. & Co. from all actions, claims and demands which he, H., and the said banking copartnership then had, or might have, by reason of the debt then due to the said banking copartnership, and that the said deed was made with the privity and consent of the said defendant A., and therefore he was discharged of all liability on the guarantee; but it appeared that H. executed the deed in his own name only, and that, at the time of his execution of it, there was a

(m) *Pendlebury v. Walker*, 4 Y. & Coll. Ex. Eq. 424.

(n) *Cullingworth v. Lloyd*, 2 Beav. 385; see *Rees v. Berrington*, 2 Ves. jun. 543; *Lee v. Lockhart*, 3 My. & C. 316.

(o) *Owen v. Homan*, 4 H. Lds. 997, 1034.

(p) *Owen v. Homan*, 4 H. Lds. 997.

separate debt due from B. to him, which accounted for his execution of it, and that the banking company, never having themselves executed, or authorized any one to execute for them, the deed of composition and release, had not acquitted the principal, B. & Co., of the debt, and, consequently, had retained their rights against the guarantor, and were entitled to recover upon his covenant.(q)

Now, here, if H. had been a member of an ordinary banking partnership, and there had been no separate debt, due from B., to him, it would have been different, because one member of a common law partnership may release a debt due to the partnership,(r) and by so doing bar his copartners from recovering it, and in such case the guarantor, [*245] *under the circumstances alleged, viz., that the release was made with his privity and assent, would have been absolved: but, perhaps, if there had been a separate debt, the release by H., even in case of an ordinary partnership, would have imported a release of that debt only.(s)

In the ensuing case a guarantee was given, *by deed*, to the banking company, under somewhat similar circumstances.

A. becomes surety, by a deed of guarantee, to the banking company, called the "Commercial Bank of England," for the repayment, to the amount of 500*l.*, of advances made, and to be made, by the company, to B. Sometime afterwards B. assigns, by deed, all his property, in trust for the benefit of his creditors, the banking company being parties to the deed, which contained a covenant, by the creditors, not to sue B., for any debts then owing by him to them, subject to a proviso, that any creditor having any specific lien or security, for his demand, might execute the deed without prejudice to the same security, &c.

A. was afterwards called upon, by the bank, to pay on his guarantee the 500*l.* with interest, which he paid, and afterwards brought an action, against B., to recover back the money, as being paid to his use.

Now, the plaintiff A. had executed the deed of assignment, B. being separately indebted to him, and the fact of his having done so, was held to be evidence, of his assent to the reserve of remedies, contained in the proviso. Therefore, the abstract question in the case was, "what is the effect of a discharge with a reserve of remedies consented to by the surety?" It was considered, as settled, that a reserve of remedies, without such consent prevents the discharge of a surety, which would otherwise be the result, of a composition with, or giving time to, a debtor, by a binding instrument. Then, that such consent has not the effect of discharging the surety as to the creditor, was considered to be clear; indeed, it was said to afford an additional reason against the discharge.

*Then, in this case, as there was no stipulation that the surety [*246] should stand in the creditor's place, (in which case, perhaps, he might have been prevented, at least in equity, from recovering over

(q) *Bain v. Cooper*, 9 M. & W. 701.

(r) See *Ruddock's case*, 6 Rep. 25; and compare *Brook v. Stuart*, 9 A. & E. 854.

(s) See per *Ld. Abinger*, C. B., 9 M. & W. 707.

against the principal,) and nothing more than the single act of assent, above mentioned; it was held, clearly, that the surety was entitled to recover against the defendant, the sum he had paid, on the guarantee, to the bank.^(t)

The following is another case, arising upon arrangement with creditors:—

A customer, as security for advances made him, by his bankers, indorses, to them, promissory notes, made by B. Before the notes are due, A. stops payment, and a deed was executed by him and several of his creditors, among whom were the bankers, whereby his affairs were placed in the hands of inspectors, and the creditors, parties to the deed, agreed not to call for, or compel, payment of their respective debts, due from him, for three years. After the execution of this deed, and whilst the notes were still running, B. assented, in writing, to the creditors executing the deed, and giving time to A., without prejudice to their claims on B. This had the effect of reviving the liability of B., in favour of the bank (and the other creditors,) although the assent of B. was given, after the execution of the deed, which had taken place, in the first instance, without the privity of B.; for it was sufficient that the assent to the forbearance should be given, at any time, before the notes became due.^(u)

Now, probably, in this instance, the bankers would have been better advised, to have obtained the assent of B., to their execution of the deed beforehand; for, in such case, B. would, probably, have been advised, that there was no room whatever for contesting the bankers' claim.

*A further question was mooted in this case, whether a deed could be executed effectually, so as to bind the banking house, [*247] by one of the partners signing "for self and partners," but it became unnecessary, for the court, to pronounce any opinion on the point; but it is certainly, in general, most hazardous for bankers, in partnership, to execute deeds, in any other mode, than by each partner sealing and delivering the deed, as his act and deed; for, in general, the law is, that one partner has no authority, to bind the partnership, by deed, and, unless he were authorized, by a power of attorney, executed by each of the others, or by separate powers of attorney, to do so, his execution would be inoperative, in any case, where it was necessary to show a deed executed by the partnership.

In equity, it is quite clear, that a person, having a valid security for his debt, but having been induced, by his debtor, to execute an instrument, legally affecting such security, under a representation that such would not be the effect, and a promise that it should not, is not, upon the application, to a court of equity, of the debtor, to be deprived of such original security.^(x)

(t) Kearsley v. Cole, 16 M. & W. 128. It makes no difference that A. was himself, at the date of the guarantee and since, a member of the banking copartnership; S. C.; see 1 & 2 Vict. c. 96, s. 1.

(u) Smith v. Winter, 4 M. & W. 454.

(x) Lee v. Lockhart, 3 My. & C. 316.

At law, when a customer, and another person, as his surety, sign a joint and several promissory note, payable to the bankers, to secure them, &c., and they afterwards execute a composition deed, whereby, in consideration of four shillings in the pound, the bankers and other creditors release the customer, from the payment, of the debts respectively set opposite their names; and the amount of the promissory note was set opposite the bankers' names; the deed also containing an express clause, that it should not operate to invalidate, prejudice, or affect any bonds, bills, notes, or other securities, &c., joint or several, &c., as to the claim against any such surety, the deed was clearly held not to release the [*248] surety; there being no fraud on the other creditors, *since the clause appearing on the face of the deed, all who executed the deed must be taken to be aware of, and agree to, the reservation of the rights against sureties.(y)

Cases of composition with creditors frequently occur, in which the interests of bankers, upon guarantees, are deeply concerned, and the form in which such guarantees are expressed ought always to be such, that the bankers shall be secured of a priority of repayments of advances, &c., over the creditors, under the composition deed. For this purpose, it is necessary that the guarantee should not be made conditional to repay, on failure of the traders to repay, but absolute. An illustration will be found, in the following case, in which the bankers sued the trustees, under the composition deed, to recover the amount of their advances, &c.

Carr and Co., being insolvent, compounded with their creditors, by agreeing to pay them a composition of seven shillings and sixpence in the pound, at three instalments, and execute a conveyance of their real and personal estate to certain trustees,—the defendants in the action,—in trust, to permit them, C. and Co., to carry on the business, subject to the control of the defendants, and to pay thereout, to the creditors, the said three instalments; and, in case of full payment thereof, to reconvey and reassign the estate to C. and Co., but, upon default of such payment, then in trust to sell, and, after deducting, out of the proceeds, interest, costs, and amount of mortgages, &c., to divide the remainder amongst themselves and the other creditors.

C. and Co. continued, accordingly, to carry on the business, and [*249] opened an account with a banking company, from *whom they obtained large advances. The bank applied to, and obtained from, the defendants, the following guarantee:—

“C. and Co., having assigned over all their real and personal estate to us, in trust, for securing a composition of seven shillings and sixpence in the pound, to their several creditors executing such deed, and it being necessary to open a banking account, for the purpose of carrying on the said trade, in order that the stock and goods on hand may be wrought

(y) *North v. Wakefield*, 13 Q. B. 536. As to the mode of executing such a deed by a banking copartnership, see *Smith v. Winter*, 4 M. & W. 457. It would be unsafe that one of the partners should execute it “for self and partners,” *id.* 466. See *S. C.*, as to revival of liability of surety. As to pleading reservation of remedy against surety, in such case, *Davidson v. McGregor*, 8 M. & W. 755.

up and converted into money, for the purpose of paying such dividends ; and you having, at our request, consented to open a banking account, on the credit of the names of the said C. and Co., or of any person or persons, for the time being, carrying on that concern ; we do hereby promise and engage, that any sum or sums of money to become due to you, or to the said banking company, in respect of such account, shall, in the first instance, be paid to you out of the net proceeds of the said trust estate, so far as the same will extend to pay."

Further advances were made, by the bank, to C. and Co., subsequent to this guarantee.

The defendants, subsequently, sold the property of C. and Co., under the provisions of the composition deed, and the proceeds were insufficient, to pay the creditors, the composition of seven shillings and sixpence in the pound.

Held, that the meaning of the guarantee was not that the defendants should be liable, to the bank, only out of the proceeds realized, from the estate of C. and Co., *after* payment of the composition of seven shillings and sixpence, to the creditors, but that they were liable, in the first instance, to repay, out of the proceeds, the whole amount of the advances, made by the bank, to C. and Co., as well before as after the guarantee,(z) and the guarantee was held to extend to advances made before it was given, notwithstanding the objection was pressed upon the court, that the recital, stating it *to have become necessary to *open* an ac- [*250] count, &c., pointed only to future advances.(z)

Bankruptcy.—Where bankers, with knowledge of an act of bankruptcy committed by their customer, took a guarantee from a surety, to secure, to the extent of 50*l.*, all sums then, or thereafter to become, due from the customer, the surety having no notice of the act of bankruptcy, and the surety, afterwards, paid to them the full sum for which he was guarantor, without specifying whether it was to be applied to a certain portion of the bankers' claim (which was held not to be provable under the *fiat*,) or to the other portion, which was provable, the court considered that this payment ought to go in reduction of that part which was provable. For want of notice of the act of bankruptcy, which consisted in making over all the customer's property, to the bankers, by means of a bill of sale, the surety was considered not to be, either when the guarantee was given, or when payment was made upon it, on equal terms with the bankers: and, therefore, if the payment was held to be applicable to that portion of the bankers' claim which arose after the act of bankruptcy, so that the payment could not be made the subject of proof against the bankrupt's estate, justice would not be done as between the bankers and the guarantor, and the payment was held to be applicable to the discharge of a part of the claim which was provable against the estate, viz., to the part of it which was incurred previously to the act of bankruptcy.(a)

(z) *Wilson v. Craven*, 8 M. & W. 584, 595.

(a) *Ex parte Sharp*, 3 M. D. & De G. 490, 504, where the V. Chanc. seems to have considered the facts to amount to fraudulent concealment by the bankers. See *North British Insurance Company v. Lloyd*, 10 Exch. 521, 533. See *Supra*, p. 233.

Trusts.—There are cases in which a trust prevails over a security given to a banker, so as to oust the bankers of *remedy upon the security, although the bankers had no knowledge of the trust. [*251]

Thus, if an executor and trustee, under a will, lends a sum of money, of which he is trustee, to a third party, on the promissory note of that party, made payable to the executor only, and afterwards becoming embarrassed, indorses the note to his banker, (who is also the banker of the maker of the promissory note,) as security for advances, the banker having no knowledge of the trust, then, as the banker acquires only an equitable title to the note, and therefore no better title to it, or to the money secured by it, than the executor could confer, consequently he acquires no title at all, as against the persons, for whom the executor was trustee. (b)

Also a right of set-off may override the banker's claim for security. Thus, if the above promissory note had been given, by the maker, for money lent by the executor, in his own right, and the maker had afterwards become a creditor of the executor, for goods sold to him in his own right, the set-off of the maker must have taken precedence of the banker's claim upon the note. (b)

In the first case, subject to the trust; in the second, to the set-off; the banker has a lien on the moneys of the maker of the note, in his hands, which may be effectual, as far as it goes, to discharge the debt on the promissory note, which had been assigned to him. (b)

A father and son gave a joint and several promissory note, to secure a balance due, from the son, to the bank. Soon afterwards, the son assigned all his property to trustees, for the benefit of his creditors, who were expressed to be parties to the assignment, and to be named in a schedule, and the deed purported to contain an absolute release of the debts, without any reservation of rights against sureties. One of the trustees was a partner in the banking house, and the deed was executed by him and the other trustees, but not by any other creditor. It was also executed by the son, *with the privity and concurrence of [*252] the father. The son was adjudicated a bankrupt, upon the execution of the deed, as an act of bankruptcy.

Held that, even assuming the father to have joined in the promissory note, as surety merely, and the partner in the bank to have executed the deed as creditor, and not merely as trustee, the father was not released, there being no reason to think, but every consideration pointing the other way, that any one intended, or anticipated, the partner's execution of the deed having that effect.

It was also recognized, as a general rule, that a surety, who has concurred in, or ratified, an arrangement between the creditor and the principal debtor, cannot claim to be discharged by the effect of that arrangement, though, in some cases, it may be necessary that a reservation of rights against the surety, should appear on the face of the composition deed. (c)

(b) *Moore v. Jervis*, 2 Coll. Ch. C. 60.

(c) *Ex parte Harvey*, 4 De G., M. & G. 881: see *Price v. Barker*, 4 E. & B. 760.

Consideration, previous to 1856.—Another principal point to be observed, with regard to guarantees, (*not made under seal and delivered as deeds,*) is, that a good consideration must appear on the face of the guarantee, or must be capable of being discovered from the words construed, *where they are ambiguous,*(*d*) by the aid of the circumstances in which the guarantee was given, if given before July 29, 1856; otherwise the bankers cannot take advantage of it.

The following instances may serve to throw light on this head, as regards guarantees given before the above date.(*e*)

“We, the undersigned, hereby indemnify the National Provincial Banking Company, to the extent of 1,000*l.*, advanced, *or to be advanced to A. B., by the said company; but the said indemnity [*253] to cease when the said A. B. shall have paid in the said sum of 1,000*l.*, to the credit of his account”—was a form of what was intended to be, the guarantee of a customer’s account.

At the date of this instrument, A. B. had overdrawn, to the amount of 1,400*l.* Now, but for this fact, the words, “advanced, or to be advanced,” might have fairly admitted of the construction, that future, as well as past advances, were in the intention of the parties; the document, however, does not, on the face of it, show that any one contemplated a security for future advances, to the extent of 1,000*l.*; it binds the sureties to pay 1,000*l.*, part of 1,400*l.* already advanced; it does not, on the face of it, import that it is to attach upon future advances; future advances are not necessary to make it attach; the full amount of it is absorbed in the debt already due. The guarantors, probably, did not know how the account stood at the time. If less than 1,000*l.* had been due, at that time, the guarantee might have admitted of the construction, that it impliedly contemplated future advances, inasmuch as it could not, otherwise, operate to the full extent intended; but when it appears that, at the time of giving the guarantee, more than 1,000*l.* has been already advanced—an existing debt to which the guarantee can be at once applied—the meaning of the guarantee is, to guarantee the existing debt of A. B., whether future advances are made or not.(*f*)

With reference to somewhat similar circumstances, the decision was different, turning, as questions respecting guarantees are apt to turn, on points, which seem at first sight, to involve mere subtleties; on a closer inspection, there will, however, mostly be discovered substantial variations.

*On the 7th of August, 1838, two persons signed a parol agreement in the following terms, by way of guarantee to A. and B., bankers, in partnership. [*254]

“In consideration of advances made and to be made by A. and B.,

As to surety’s right to be indemnified by principal, *Close v. Close*, 4 De G., M. & G. 176. A guarantee may be so framed that the release of the principal shall not be a release of the surety. *Cowper v. Smith*, 4 M. & W. 519.

(*d*) See per Parke, B., 1 Exch. 158; per Ld. Campbell, C. J., 20 L. J., Q. B. 9.

(*e*) See 19 & 20 Vict. c. 97, s. 3.

(*f*) *Bell v. Welch*, 9 C. B. 154. See a similar bad form, *Raikes v. Todd*, 8 A. & E. 846; and per Cresswell, J., 2 C. B. 638, 643; and *Tindal, C. J.*, id. 642; *Maule, J.*, id. 643; and see *Bainbridge v. Wade*, 16 Q. B. 89.

bankers, or by any other persons of whom their firm may, from time to time consist, in the way of loan, payments, discount, or otherwise, to G. F., we jointly and severally hereby guarantee the said A. and B. the repayment of the said advances, and indemnify them against any loss, by reason of such advances; our liability not to exceed the sum of 1,000*l.* This guarantee to be a continuing guarantee, and to be a security to the said A. and B. to the extent of 1,000*l.*, as aforesaid, for the whole of any balance which may, from time to time, or at any time, become due to the said A. and B., or to the persons, for the time being constituting the firm of the said banking house."

At the date of the guarantee, G. F., who was an old customer of the bank, owed them a balance of 1,685*l.* 10*s.* 10*d.*; after that date, various other sums were advanced to him.

Held, that the guarantee disclosed a sufficient consideration to pay past, as well as future advances; some advances having, in fact, been made subsequent to the date of the guarantee, and the circumstance of the bankers not binding themselves, by the terms of the instrument, to make advances, being of no consequence, since the advances actually were made in pursuance of the instrument.^(g)

This decision took place, it is material to observe, before 19 & 20 Vict. c. 97, s. 3, was passed.

The following was the form of the guarantee, in another case, which also occurred before the alteration of the law by 19 & 20 Vict. c. 97, s. 3.

"We hereby become bound to guarantee to you, as *cashier, [^{*255}] &c., and as acting for behoof of the Aberdeen Banking Company, all current obligations and engagements in your hands, to which J. S. may be a party, and also all his future obligations and engagements that may come into your hands, as cashier aforesaid, or into the hands of your successors in office, in the course of business. This guarantee, however, to be limited to the sum of 1,000*l.*; such to be a standing guarantee, and in force, until recalled by us."

This was sent, in form of a letter, addressed to the cashier of the Aberdeen Banking Company, and signed by a trading firm.

On the faith of this instrument, the bank discounted, for J. S., several bills of exchange, to the amount of 998*l.* 10*s.* 5*d.*, all which bills were dishonoured, and no part of the amount paid to the bank, with the exception of 50*l.*; so, on the whole, the balance on this account, against J. S., was 948*l.* 10*s.* 5*d.*

J. S. had a banking account, with the bank, wholly distinct from the former account, which was confined to discount transactions; and at the time when a *fiat* of bankruptcy issued against the guarantors' firm, the banking account showed a balance of 166*l.* in favour of J. S.

The bank was held entitled to prove, for the difference between the

(g) *Chapman v. Sutton*, 2 C. B. 634. "In consideration of giving credit," held sufficiently to show past as well as future credit to be meant. *Edwards v. Jevons*, 8 C. B. 437. Consideration by necessary implication, *Caballero v. Slater*, 14 C. B. 300; *Glyn v. Hertel*, 2 J. B. Moo. 134.

two accounts, it being considered that the mention of the future obligations and engagements implied a consideration.^(h)

The above is the law, with respect to guarantees given previously to 29th July, 1856; such guarantees, unless made under seal, and also delivered as deeds, must contain the consideration expressed on the face of them, &c., as above laid down, in order to be valid and effectual, when proceedings are to be taken on them.

With respect to instruments, of this kind, made since that *date, the law has been altered; and it now is not necessary that [*256] any statement of the consideration should appear in such undertakings by simple contract, any more than in deeds, provided such undertakings be "in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized."⁽ⁱ⁾

Promissory Note as Guarantee.—A guarantee is sometimes given, in the form of a promissory note, signed by the guarantor; but in such case the instrument will often be found to operate as an agreement, and must consequently be stamped accordingly, in order to be made effectual.

Thus, if two persons, as guarantors or sureties for a customer of a bank, sign, along with the customer, an instrument in such form as the following:—

"We jointly and severally promise to pay the sum of 100l. to the Lincoln and Lindsay Banking Company, or their order, on demand, with interest."

And on the back of the document there is this indorsement, signed by the same parties:—

"The within note is given for securing floating advances, from the said banking company, to the customer, with interest, from the respective times when such advances have been or may be made, together with commission, stamps, postages, &c., and all usual charges and disbursements, not exceeding in the whole, at any one time, the sum of 100l."

Then, in an action by the bank, against one of the two sureties on the note, to which there was a plea of the Statute of Limitations; and payments were shown to have been made, by the customer, in reduction of the balance due on the banking account, within six years, before action. Held, that in order to point the payments to the note, it was essential to the plaintiff's case, to take notice of the indorsement, in order to show the note to be a security for the floating balance; *for which purpose it was an agreement*, and being *above the value of 20l., required [*257] an agreement stamp, to be admissible in evidence.^(j) Not having such stamp, it could not be taken advantage of.

It will be seen that the bankers, in this case, were ill-advised in two respects.

(h) Ex parte Littlejohn, 3 M. D. & De G. 182; see S. C., as to stamp; see form, 3 M. D. & De G. 490; and another form and observations of judges, 5 C. B. 810, 816.

(i) 19 & 20 Vict. c. 97, s. 3.

(j) Cholmeley v. Darley, 14 M. & W. 344; see per Coleridge, J., 22 L. J. (N. S.) Q. B. 267. What not a promissory note but a guarantee, see cases, 7 M. & W. 410; 2 M. & Gra. 644; and see 10 A. & E. 98; 11 id. 213; 4 Bing. N. C. 423; 5 Bing. N. C. 156.

1. They ought to have insisted that the document should be stamped, when given.

2. They ought to have brought the action sooner; it, in fact, having been brought about eight years after the cause of action might have arisen.

If the security or guarantee taken be in the form of a joint and several promissory note, payable to the bankers on demand, and signed by the customer, and the guarantor, for a given sum; then, when the guarantor is sued, on this note, for the sum mentioned in it, to allege that the defendant made the note as the surety, and for the accommodation of the customer, with the knowledge of the bankers, and that after the note became due, and payment had been demanded of the customer, the bankers being holders, without the consent or leave of the defendant, agreed to give time to the customer, is wholly ineffectual as an answer to the action, there being no specific agreement, on the part of the bankers, to take the note, from the defendant, as a surety only; and it was left a doubt whether, if there had been, at the time of the making of the note, such a specific agreement entered into, the surety would have been discharged, by time given to the customer. (*k*)

Probably it is not unusual, and it is prudent, for bankers, on taking a [*258] note of this kind, to point out to the surety that, *though he signs only as surety, he will be treated, in all respects, as a principal, if need be; and in no case, ought they to receive such a note, or agree to receive it from him as surety lest it should be held that in such case he was discharged, by reason of time being given to the customer.

There is another consideration relative to a joint and several promissory note, of this nature, given for the above object.

In cases of banking copartnerships, &c., such notes are not unusually made payable to trustees, of the banking company, or their order, on demand.

But in case of an indorsement of the above kind, that is to say if the note bears a memorandum to the above effect, the question arises, what, if the note be indorsed over, by the payees, will the indorsee be able to recover? The answer must be, that it is quite uncertain, and must depend upon the state of the account, at the date of the indorsement. This shows that such an instrument could hardly be regarded as negotiable. In fact, with such indorsement, even if properly stamped, the document is not a promissory note, and cannot be declared on by the payees, as such, but must be treated as an agreement. The payees would be non-suited, if they declared upon it, as a promissory note. (*l*)

It is not uncommon for joint stock banks to take a joint and several promissory note, signed by the customer and other parties, the latter of whom are intended to be sureties for the former, in order to secure any balance, that may become due, to the bank, on his account with them, or to secure advances made by them to him.

(*k*) *Manley v. Boycott*, 2 E. & B. 46. See case of a joint security, *Other v. Iveson*, 3 Drew. 177. A promissory note containing, in body of it, a memorandum of deposit of title-deeds, as collateral security, will require a mortgage stamp. *Wise v. Charlton*, 4 A. & E. 786; see *Robins v. May*, 11 A. & E. 213; *Pancourt v. Thorne*, 9 Q. B. 312. (*l*) 14 M. & W. 347; see per Coleridge, J., 22 L. J., Q. B. 267.

Now, in the first place, it is very material that the persons having the management of the business, or of the accounts of the bank, should be satisfied that there is nothing, in their deed of settlement, to prohibit any arrangement of this nature. Many deeds of settlement contain stringent provisions, to prevent the funds of the company being advanced, or *risked upon merely personal security. In such case, if the [*259] promissory note turned out to be unproductive, the directors would probably, indeed, almost certainly, be held liable to make good the amount lost.

Secondly, in case the promissory note should be indorsed with a memorandum, to the effect that the within note is given, for securing floating balances, of the customer, not exceeding, &c., in whole the amount of the note, it is often material, in order to defeat a plea of the Statute of Limitations, (as by showing that payments, that have been made by the customer in the interval, had reference to the promissory note,) that the indorsed memorandum should bear an agreement stamp; indeed, no such note ought to be taken, with such indorsement, if the amount of the note is above 20*l.*, except the indorsement bears the proper stamp.^(m)

To secure an advance of 1,000*l.*, from a banking copartnership, made to a person who was not, at the time, a customer of that concern, but who wanted the money for the purpose of paying off a debt, owing to another banking copartnership, of which he had been a customer, the banking company, first mentioned, agreed to advance, upon several other persons joining him in a bond, which was entered into accordingly, and the money advanced; and the borrower opened an account and became a customer of the banking company.

It cannot be held, in such case, to be invariably the rule that all payments made subsequently to giving the bond, by the borrower, to the bank, is to be applied in immediate and final liquidation of the 1,000*l.*, or that if the borrower, after the giving of the bond, on a long course of transactions, be, for a time, in advance to the bank, the bond is thereby satisfied.

It may be, in default of express stipulation, to be inferred, from the conduct and language of the parties, after the execution *of [*260] the bond, that the intention was for the bond to stand as a continuing security, in which case the rule of application of payments would not apply.⁽ⁿ⁾

The bond was considered to have been given, to secure the banking company, from advances which they might make, *from time to time*, and consequently had not been discharged.

In truth, such a bond ought never to leave it a question, on the terms of it, with what intention it was given. Trustees, or others interested for banking copartnerships, ought, therefore, to be careful in ascertaining that the bond has words expressing the meaning of the parties, both by positive and negative clauses.

A., being a customer of a bank, prevails upon B. to join him in a

(m) Cholmeley v. Darley, 14 M. & W. 344.

(n) Henniker v. Wigg, 4 Q. B. 792.

promissory note for 150*l.* to secure his balance; this he sends to the bank, with a letter, stating that he had got B. to join, with him, in the note. The note is never entered, in the books of the bank, to A.'s debit. When it became due, there was a balance against A., but, within a few days afterwards, there was a balance of 250*l.* in his favour. On these facts, it was contended, in an action against B., by the bank, that the note must be taken to have been paid, or that, as B. had signed only as surety, and without consideration for making the note, and as the bank had accepted the note on that understanding and knowledge, and had given time to A., the principal, without B.'s knowledge, therefore B. was discharged.

But it was held, that the facts did not support either of these defences, for that where two persons give a joint and several promissory note, for the debt of one, it is necessary, in order to give the other the rights of a surety, as against the creditor, to show that he was only a surety, that the creditor knew it, and accepted him as such; and that mere inactivity, forbearance or lying by, does not amount to giving time, and that refraining from appropriating the balance of *A.'s account, in payment [*261] of the note, did not discharge B. from his liability.^(o)

The note was never entered to the debit of A., and the bankers were not bound to pay it; although if the payment had been made, to the principal, it would have availed for the benefit of the surety, and it has been said that it would entirely alter the position of bankers, if it were to be considered that because, after they take a joint and several promissory note, they have a balance, in their hands, belonging to one of the parties to the note, the other should be discharged, if he turned out to be a surety.^(o)

A joint and several promissory note is made to a banker, by a customer and his surety, to secure advances, made by the banker. The customer afterwards pays into the bank generally sums, exceeding the amount of the advances, but also draws out to a still larger amount, and becomes bankrupt. In such case the surety is liable, for he cannot insist that the payments should be appropriated, in discharge of the sum secured by the note.^(p)

A. and B., being partners, got permission, from their bankers, to overdraw their account, on B. giving, to the bankers, his promissory note for 2,000*l.* as a security, A. giving to B. his (A.'s) promissory note for 1,000*l.*, being half the liability incurred. B. indorses this note, and pays it into *his* account with the bankers, who were, in fact, ignorant of the circumstances under which he took the note. When the account was overdrawn by 1,300*l.*, and after the termination of the partnership of A. and B., the bankers sued A. on the promissory note for 1,000*l.*, and it was held that they were entitled to do so; for, although the effect would be, in the first instance, to cause A. to pay, to them, more than one moiety of the 1,300*l.*, yet, it was observed, that he might call upon

^(o) Strong v. Foster, 25 L. J., C. B. 106, 110.

^(p) Ex parte Whitworth, 2 M. D. & De G. 164; see Strong v. Foster, 25 L. J., C. B., 106.

B. to pay back his proportion. It would have been the same, [*262] *in all respects, apparently, if the bank had known of the circumstances, in which the promissory note was given, to B.(q)

Joint and several Covenant.—If a joint and several covenant is entered into, by a principal and his surety, that the principal shall repay a sum advanced, by three instalments, with interest, on three specified days, and one instalment is duly paid, but before the second is paid, the surety becomes bankrupt; the creditor may prove, against the bankrupt's estate, in respect of the amount of the two unpaid instalments, and interest, as upon a contingent liability, under 12 & 13 Vict. c. 106, s. 178.(r)

It will be observed, that here there is a measure of the liability; it cannot exceed a certain sum; and this decision, being upon appeal to the lords justices, must rule all future cases, in which the liability can be ascertained, and which are not cases of merely unliquidated damages.

Good Conduct of Clerks.—With respect to guarantees for the good conduct of clerks, of bankers, a point which has already been adverted to, namely, whether the guarantee, that is taken, is in such a shape as to stand good, in case of a change, in the members of the banking house, arises more frequently in cases of guarantees for the fidelity of clerks, &c., than in those of guarantees for the repayment of advances to customers, and therefore requires to be more fully developed.

In considering this subject, the courts are chiefly guided, by the intention of the parties. This is mostly discoverable only from the expressions, they have used, in the instrument of guarantee. In other words, it is most important, for the security of bankers, that the words used shall clearly and *undeniably demonstrate the intention, that the guarantor, whether he undertakes, for the good conduct [*263] of the clerk, during a limited or undefined period of time, should be bound to the *banking house*, not to the persons who may be members of the establishment, at the date of the guarantee; because, in case the guarantor is only bound, in the latter way, upon any change in the partnership, by death, by retirement, or by taking in fresh partners, the new partnership *might* find themselves unable to enforce the obligation.

The following is an illustration of what has just been said, as to the effect of change of partnership.

A guarantor executes a bond, whereby he undertakes, to A., for the fidelity of a clerk, so long as he should continue in A.'s service as clerk. A. takes a partner, and brings an action on the bond, and assigns, as a breach, that the clerk had received money, on account of the partnership, and had not paid it over, to the partners, but A. was not permitted to recover, the court saying that when A. took a partner, there was an end of the obligation; that the condition was confined to A. alone, and the breach assigned was not within the condition, and there was nothing to show, the guarantor to have intended, to be bound, for the clerk's fidelity to any other person than A.(s)

(q) *Heywood v. Watson*, 4 Bing. 496.

(r) *Ex parte Barwis*, 25 L. J., Bank. Cas. 10; *Ex parte Willis*, 4 Exch. 530.

(s) *Wright v. Russell*, 3 Wils. 530; S. C., 2 W. Bla. 934, see sup. pp. 221, 222.

This decision, it is true, has been questioned by some judges,^(t) but the principles on which it is founded do not appear, either expressly or impliedly, to have been decided *to be inapplicable to cases, [*264] where the facts were tantamount, and the terms of the guarantee equivalent.^(u)

In connection with this class of cases, may be here mentioned one which, though it can, in general, only be applicable, in instances where, a banking house is conducted, by a single person, without partners.

If a bond be taken that a clerk shall serve faithfully, and account for all money, bills, notes, &c. which he shall receive, &c. to the banker, and his executors, administrators and assigns, it does not make the surety liable for money, &c. received by the clerk in the service of the executors, &c. who continue the business, and retain him, in the same employment.^(x) This case turned upon the intention, which was held to be, to guarantee the service to the testator, and no longer, and must be considered with reference, to the statutory enactment (passed since its date,) mentioned above.^(y)

In a case, where a bond was given, to guarantee to a company, not incorporated, the faithful services of a clerk, and the bond was made to and with trustees on behalf of the body, the court held, construing the instrument with regard to the obvious intention of the parties, that it might be sued upon by the trustees, at any time, during the continuance, in the service of the actual body of persons, carrying on the same business, under the same name, notwithstanding any intermediate change of the original holders of the shares, either by death or transfer.^(z)

So where a joint stock banking company had been established, [*265] *under stat. 7 Geo. IV. c. 46, and a guarantee was given it, and then, upon a considerable accession of proprietors and capital, and an increase in the number of directors, the company took another name, it not being shown to differ, in its constitution, from the former bank, the bank remaining the same, though with a different name: it was held, that its public officer might sue and recover upon the guarantee given to the former establishment.^(a)

Another point to be considered is, that a guarantee, for the faithful services of a clerk, given at a time when his employment comprises a certain routine of duties, will not extend to cover other, or additional,

(t) Ex. gra. in *Barclay v. Lucas*, 3 Dougl. 32; S. C., 1 T. R. 291, n.; see 1 Taunt. 292; but *Barclay v. Lucas* has not escaped without much question; see the note at the end of the report in 3 Dougl. 321. However, *Chapman v. Beekinton*, 3 Q. B. 722, recognizes the principle of it, and the same seems to be the ground of decision in *Metcalf v. Bruin*, 12 East, 400; *Wilson v. Craven*, 8 M. & W. 584; viz., that the *bank* was the same all along. So in other cases, *London, &c., Railway Company v. Goodwin*, 3 Exch. 331; *Eastern, &c., Railway Company v. Cochrane*, 23 L. J., Exch. 61.

(u) See *Dry v. Davey*, 10 A. & E. 30.

(x) *Barker v. Parker*, 1 T. R. 287; but compare per Lord Ellenborough, C. J., *Strange v. Lee*, 3 East, 490; Lord Mansfield, C. J., 1 T. R. 295, distinguishes *Barclay v. Lucas*, by observing that there the same trade was carried on, by the original masters, in the same manner, and the only difference was, the introduction of a new partner.

(y) See *supra*, p. 222.

(z) *Metcalf v. Bruin*, 12 East, 400; see 9 J. B. Moo. 109, 110; see *supra*, p. 222.

(a) *Wilson v. Craven*, 8 M. & W. 584.

duties that may be imposed on, or accepted by, him; thus, if a clerk to a bank, for whose good conduct, *as clerk*, a guarantee has been given, is made manager, and it be shown, conclusively, that he ceased to be clerk when he became manager, so that no breach of the bond could have happened after he became manager, that will be an answer to an action, by the bankers, on the bond, against the surety, founded on misconduct as manager; (b) at least, this would, in all probability, be ruled in any case where the guarantee did not expressly engage for his performance of his duties as clerk, or in any other capacity. (b)

It is scarcely necessary to observe that the conduct, which amounts to a default, on the part of the clerk, and which renders the surety liable, upon his undertaking, must be some act or omission, some malfeasance or nonfeasance, within the scope of the duties appertaining to the situation he fills.

A clerk of a provincial bank (in Devonshire,) who was sent by the manager, at the request of a customer, to his residence, about eleven miles from the bank, in order to receive a large sum of money, to be placed to the customer's account with the bank, and who, casually, on his way back, lost the money out of his pocket, was held to have received *the money, in the course of his employment, as clerk, and, although the jury found it not to be the custom of bankers, in [*266] that part of the country, to send for their customers' money, as above stated, a surety, who had guaranteed the bank that the clerk "should well and faithfully serve them, as a clerk, and should not cancel, obliterate, spoil, destroy, waste, embezzle, spend, or make away with, any of the books, papers, writings, stamps, cash, bills of exchange, promissory notes, or other property of the bank, or of any of the customers, &c., which should be deposited in his hands, or intrusted to his custody or possession, or come to his care, custody or possession," was held to be responsible to the extent of the moneys lost. (c)

The same would be the decision in case of the payment of a cheque, or the receipt of money, *after banking hours*, or of sending the clerk to London, on a sudden emergency, to obtain funds, or the like. (d)

The fact of a clerk having received into his personal possession a sum of money, and having lost it, is strong evidence of negligence; but it would have been an answer to the action above referred to, to have shown that the loss had been occasioned by robbery, before the clerk could have got back to the bank, and without his default. (e)

Evidence.—In cases of guarantees, or securities of any kind, taken for the good behaviour of clerks, it is material to bear in mind that whatever is evidence available against the principal, is available against the surety.

Thus, where bankers sued the obligor of a bond, given for the fidelity

(b) *Anderson v. Thornton*, 3 Q. B. 271, where see the terms of the engagement; and see *supra*, p. 222.

(c) *Melville v. Doidge*, 6 C. B. 450; S. C., it was found to be the custom, for London bankers, to send about, in all directions, for their customers' money.

(d) See 6 C. B. 454.

(e) See *Walker v. British Insurance Society*, 21 L. J. (N. S.) Q. B. 257.

of a clerk, &c., entries of receipts of money, by the clerk, in the books, kept by him, in discharge of his duty *as clerk to them, were [*267] held to be, after his death, evidence, against the surety, of the fact of his having received the moneys therein mentioned, (f) it being part of his guaranteed duty to keep those books.

The reason for taking such security, is not only the obvious one, that in case of any embezzlement by the clerk, the banker may have the means of protecting himself against the loss thereby caused, but also that he may have the same protection, in case of any loss arising from the merely careless or thoughtless inattention to his duty, of the clerk, in which case, without such security, the loss must ultimately fall on the banker, assuming the clerk to be unable to make it good. (g)

But where a fraudulent scheme has been concocted, between a customer of the bankers and their servant, the object of which is to impose upon them, and, in pursuance of this scheme, a cheque has been drawn by A., payable to the customer, or bearer, and by the customer indorsed to the bankers, and by their servant carried to the customer's credit, in order to cause the bankers to think that that account was not overdrawn on a given day, with the understanding that, after that day the cheque should be returned to the customer; there no loss shall be suffered by the bankers, but they may sue the maker of the cheque upon it, though he was not shown to have been acquainted with this arrangement, the bankers themselves being no way privy to it. (h)

Embezzlement.—In a case where a clerk to a bank misappropriated funds that came to his hands, as clerk, and died before the fraud was discovered, without a will, leaving considerable personalty, which was placed by his widow in the custody of the bankers, and she took out letters of administration, and commenced proceedings against them to recover *the property, it was held to be no answer to a bill filed [*268] by them for an injunction and administration of the estate, to say that the bill alleging a felony, no civil remedy lay in respect thereof. (i)

If a clerk commits an embezzlement on the bank, and his father, in order to cover his defalcations, transfers stock into the name of the banker, this is a composition of a felony to prevent a prosecution, and it seems that the value of the stock cannot be recovered, nor will the stock be ordered to be transferred. (k)

A clerk of a banking copartnership, under 7 Geo. IV. c. 46, may be convicted of embezzling the moneys of the company, though he is a shareholder or partner in such company. (l)

A well-known principle of the common law frequently governs cases of misconduct, as regards the mode of proceeding criminally against bankers' clerks, and may properly be stated here. It is this:—When goods, which a master has never been in possession of, are delivered by

(f) *Whitnash v. George*, 8 B. & C. 556.

(g) *Rogers v. Kelly*, 2 Campb. 123.

(h) *Bosanquet v. Corser*, 8 M. & W. 142.

(i) *Wickham v. Gatrill*, 2 Sma. & G. 353.

(l) *Reg. v. Atkinson*, Car. & M. 525.

(k) *Claridge v. Hoare*, 14 Ves. 59.

a third person to a servant, for the master's use, and the servant, instead of delivering them to his master, by depositing them in his house, or the like, converts them to his own use, this, at common law, is no larceny;^(m) thus, if a banker's clerk receive money at the counter, and, instead of putting it into the proper drawer, &c., purloin it, he is not guilty of larceny;⁽ⁿ⁾ or, if he receive a bond for the purpose of being deposited in the bank, and instead of so doing, take possession of it for his own purposes, he is not guilty of larceny.^(o) So, where a servant was sent to get change for a bank note, which he got, but absconded with the change, it was holden no larceny.^(p)

*But, where a clerk and cashier of a bank made false entries in the books, to the credit of a customer, then obtained the customer's cheque for the sum thus falsely placed to his credit, and paid the amount of the cheque to himself, by bank notes, this was considered by the judges to be a larceny of the notes; for they were originally in the possession of the master.^(q) So it is larceny, if a cheque, drawn by the master on his banker, be delivered by him to his servant, to carry to another person, or to buy goods with, and the servant apply it to his own use; this is larceny of the cheque.^(r)

With respect to the prosecution of clerks, &c., for embezzlement, it may be often material to investigate the facts, in particular cases, with reference to the principles following:—

Embezzlement necessarily involves, in the idea of it, secrecy and concealment. If, therefore, instead of denying the appropriation, the prisoner, in rendering his account, admits the appropriation, alleging a right in himself, &c., his offence is not embezzlement.^(s) So, where a clerk's duty was to enter all such moneys as he should receive, &c., in a book, and remit the amount weekly, &c., and he was found to have made entries regularly, but with respect to three particular sums, not to have remitted them, this was held to be matter of account, not felony.^(t)

On the other hand, it has been held that, where it was the duty of a servant to account every evening for, and pay over all moneys received by him for his master during the day, and he received three several sums, on different days, and omitted to account for or pay them over, though without ever denying the receipt of them, or ever delivering any account in writing, in which they were omitted, the wilful omission *was equivalent to a denial of the receipt, and the servant [*270] was found guilty of embezzlement.^(u)

It was the duty of the cashier of a bank to receive cash, and enter the amount so received in a book; and at the close of the business of the day to see that the cash in hand agreed with the sums entered in this book, and to strike a balance, and to put the cash received either in

(m) 2 East, P. C. 568.

(n) R. v. Bazeley, 2 Leach, 835.

(p) R. v. Sullens, 1 Mood. C. C. 129.

(q) R. v. Hammon, R. & Ry. 221; 4 Taunt. 304, S. C.

(r) Reg. v. Heath, 2 Mood. C. C. 33; Reg. v. Beaman, C. & Mar. 595.

(s) Reg. v. Norman, Car. & M. 501; see Reg. v. Evans, *infra*.

(t) R. v. Hodgson, 3 Car. & P. 422; Reg. v. Creed, 1 Car. & K. 63.

(u) Reg. v. Jackson, 1 Car. & K. 384.

(o) R. v. Waite, 1 Leach, 28.

a drawer in the counter, or in a box, of both of which he had the key. It was part of his duty to pay money, as well as to receive it. On a certain day, the cash in the book at the close of business, appeared to be 1,762*l.*, which sum the clerk carried forward, as in due course ought to have been done. At the close of business on the next day, the clerk, after crediting himself with money paid by him, and debiting himself with cash received, made the balance in the book 1,309*l.*, and that sum he ought to have had in one or other of the above-mentioned places. It was found, however, that there was only 345*l.*, leaving a deficiency of 964*l.* The clerk never denied that he was short. The judge at the trial directed the jury that, if the clerk took the money from the possession of his employers, the offence would be larceny; but if he took money paid to him on account of his employers, before it reached the possession of the employers, that would be embezzlement; and the jury—there being counts for larceny as well as for embezzlement—(x) found him guilty of embezzlement, and not guilty of larceny.(y)

Discharge of Guarantor.—The guarantor, for “the true and faithful discharge of the trusts which the bankers, his employers, might repose in A. B., acting as cashier, or superintending clerk, in their banking [271] house,” (which A. B., *three years after the date of the guarantee, is found to have embezzled a sum of 1,292*l.* 8*s.* 6*d.*.) is not discharged by the circumstance of the bankers never having given actual notice of A. B.’s misconduct, either to the guarantor or to other parties, who had also guaranteed A. B.’s conduct, until three years more had elapsed; at least, if it be shown that the guarantor knew of the fact from other sources, it not appearing that the bankers concealed it from him industriously.

Nor is the guarantor, in such case, discharged, though it appear that the bankers have given credit, in their books, for the above amount, to A. B., entering it as a private loan, with a view to conceal, the real state of the case, from the other clerks, and so to preserve the credit of the house from suffering.

The facts were left to the jury, in an action by the bankers on the guarantee, to say, upon consideration of them, whether the bankers, by so doing, had waived the guarantee and exonerated the guarantor; and the jury found for them.(z)

In case of a guarantee of this kind, the contract of a guarantor is not like that of the parties to a bill, who are only secondarily liable, and to whom notice must be given, of the default of the party primarily liable, in order to charge them; for the guarantor’s contract is not that he will make up any deficiency, if A. B. does not, but he is bound absolutely to pay for A. B.’s deficiency.(a)

(x) See now 14 & 15 Vict. c. 100, s. 13.

(y) *R. v. Grove*, 7 Car. & P. 635; compare *Reg. v. Chapman*, 1 Car. & K. 119.

(z) *Peel v. Tatlock*, 1 B. & P. 419. As to declaring on a guarantee to bankers, 5 M. & W. 563; 4 M. & Gra. 42; 5 Q. B. 833. Evidence, 1 Exch. 154.

(a) Per Heath, J., 1 B. & P. 422. However, a plea that A. B. has paid, and the bankers have accepted, in satisfaction of all damages, &c., relating to it, a certain sum, may be a good plea as to so much. *Lyall v. Higgins*, 4 Q. B. 528.

On the other hand, as we have seen, ^(b) any variance in the agreement to which the surety has subscribed, which is made without his knowledge or consent, which may prejudice him, or which may amount to a substitution of a new *agreement for a former agreement, even though the original agreement may, notwithstanding such variance, be [*272] substantially performed, will discharge the surety.

This is the rule; and it may be illustrated by the example following: where a surety guaranteed the faithful and honest conduct of a clerk, who was paid by salary, and his employers, sometime afterwards, changed this part of their arrangement with him, and paid him by means of a commission, which amounted to more than his former salary; it was held, that the surety was discharged by reason of the alteration. ^(c) So, where A. becomes guarantor of the good conduct of a clerk in a bank; the clerk is, subsequently, appointed to a better situation, in a branch of the bank, and A. extends his guarantee to the conduct in this new situation. The clerk, afterwards, undertakes, on having his salary raised, to become liable to one-fourth of the losses on discounts, and then allows a customer to over draw, whereby the bank suffers loss. A. was held not to be liable, for this loss, to the bank, though it was within the terms of his original guarantee, because the fresh arrangement, *made without his knowledge*, was a discharge. ^(d)

Change of Firm.—The following decision illustrates, still further, the position already stated, that, when, from the terms of the guarantee, it can be seen that the intention was to secure the good conduct of the clerk, while serving the banking house, whether the same persons who constituted the partnership remained in it or not, the obligation will be treated as a continuing one, as regards the changes in the body.

The bond recited that *the plaintiffs* had agreed to take *one [*273] Jones into their service, and employ, as a clerk, in their shop and counting house, &c., and that the guarantor had agreed to become security for his fidelity; and the condition was, that if Jones should faithfully account for, and pay to *the plaintiffs*, all sums of money, &c., in the service of *the plaintiffs*, and did not embezzle, &c., then the condition to be void.

The plaintiffs, in the action, were the members of the banking house at the time that the bond was given, and to whom the guarantor was bound; but it appeared that, some time after that date, the plaintiffs had taken a fresh partner, and it was after this change, in the partnership, that the clerk's default took place. The breach assigned was, that, after the addition to the partnership, Jones continued in *their* service, and received a certain sum of money, *three quarters of which he received on account of the plaintiffs*, and did not pay over, &c.

It is to be observed, that the concern appears to have consisted origi-

(b) Supra, p. 180.

(c) North Western Railway Company v. Whinray, 10 Exch. 77; see Evans v. Earle, id. 1. When the condition of the bond did not contain any stipulation that the same salary should be continued, either express or implied, the guarantor would not be discharged by reduction of salary. Frank v. Edwards, 8 Exch. 214; explained, 10 Exch. 81, 82.

(d) Bonar v. Macdonald, 3 H. Lds. 226.

nally of the three plaintiffs, the whole number of partners being four, after taking in the new one; hence the plaintiffs allege, that three parts of the money, received on account of the house, belonged to them.

The court held the intention of the parties to the guarantee to be, a security to the house, so that no change of partners would discharge the guarantor; (e) and it was observed that, in houses with many clerks, the inconvenience of demanding fresh security from each, upon every change of partners, would be enormous. (f)

Bankers, how to take guarantee.—It was, in all cases, desirable that bankers, in taking a guarantee of this description, should insist upon a bond being executed by the guarantor, *as by that means all ques- [*274] tions were got rid of, respecting the sufficiency of the statement of the consideration, in the writing purporting to be a guarantee, to support the document as such. The numerous cases which have been contested in the courts, on this ground, in cases of guarantees by simple contract, and the oftentimes conflicting decisions which have been pronounced, on instruments, very nearly approaching to identity of signification, in their terms, showed this very satisfactorily, and rendered it most unsafe for bankers to rely on merely written, not sealed and delivered, guarantees.

With respect, however, to all guarantees given since 29th July, 1856, the stat. 19 & 20 Vict. c. 97, s. 3, dispensing with the necessity for the statement of consideration in such cases, provided the undertaking be "in writing, and signed by the party to be charged therewith, or some other person, by him, thereunto lawfully authorized," makes such precaution useless. Some of the more immediately useful cases, as containing principles which may be found still applicable to banking purposes, in this respect, are already indicated in this work. (g)

Liability of Executor of Guarantor.—A clerk, to secure his employers, &c., joins, with two sureties, in executing a joint and several bond to his employers. The period of the clerk's service was undetermined; but either party might determine it at his option; the bond was to extend over the period of his continuance in the service.

One of the sureties soon afterwards dies, and his executrix gives notice, to the employers, that she should not consider herself liable on the bond.

His employers, in consequence, obtain from the clerk, the bond of a fresh surety.

Then the surviving surety dies, and then the new surety; [*275] and lastly, the clerk, four years and a half after the first-mentioned death of the surety, himself dies; and deficiencies are thereupon

(e) *Barclay v. Lucas*, 1 T. R. 291, n.; S. C., 3 Dougl. 321; *Theob. Princ. & Surety*, 77; see *supra*, p. 222.

(f) See also *McGahey v. Alston*, 1 M. & W. 389, S. P. See, when surety is only liable for a limited period, as to pleading, &c., *Kitson v. Julian*, 4 E. & B. 854.

(g) See *Kennaway v. Treleavan*, 5 M. & W. 498; and see 4 Q. B. 531; 1 C. B. 262; per Erle, J., *Steele v. Hoe*, 19 L. J. (N. S.) Q. B. 93; 8 Q. B. 333, and *sup. pp.* 252-255.

discovered in his accounts, principally in respect of sums received by him after the date of the bond of the fresh security.

Under these circumstances, the executrix was held to have no right to restrain the firm from suing her on the bond, the firm never having released her, as executrix, or given her any intimation that they did not consider her liable; ^(h) for the rule of law is this—sureties of this description are not discharged from their obligations, unless the contract between them and the obligees, is varied by a positive contract between the obligees and the principal, without notice to the surety, ⁽ⁱ⁾ and it is the duty of the surety to see that the principal performs his obligations, &c. ⁽ⁱ⁾

Bankers finding Sureties, &c.—We may close the subject of guarantees, by adverting to the cases in which bankers may be required to find sureties upon their appointment as treasurers, &c., to public bodies.

A., B., & Co., enter into a joint and several bond, for the faithful performance, by A., of his duties as treasurer of a poor law union, in receiving, &c., moneys, &c. A. and another person were bankers, and A. had, in fact, never been in the exclusive receipt of the moneys of the union, which were paid into the bank; the overseers of the parishes, constituting the union, having been directed, by the board of guardians, in their printed contribution warrants, “to pay to Messrs. Brodie & Co.,” and the cheques, drawn by the board, requiring A. and his partner to pay, &c.

*The court held it to be an established principle, that for moneys paid to two or more parties, the surety for one is not liable, [*276] and therefore, that if a person is surety for another, for the due accounting for moneys received by him, the receipt of moneys by that person, and his partner, is not the same as the receipt by him alone, because the surety may be willing to be accountable for one individual, but not for him and his partner, and a payment to one partner is a payment to both. Here the board drew cheques on the banking firm, treating them as their joint treasurers, and from that it was inferred that they agreed to the moneys being paid into the bank, to their credit, just as any other customer. Hence, when the bank failed, with a balance due to the union in its hands, the sureties of A. were held not to be liable, and a sum equal to the above balance having been paid, to the board of guardians, by one of them, under a mistake of facts, was held to be recoverable back again. ^(k)

If the guarantee had been for the good behaviour of the partners, and that they and the survivor, and survivors, of them should account for, &c., all moneys paid to them, or either of them, or any person thereafter in partnership with them, &c., the retirement of one of the partners would have released the surety. ^(l)

^(h) Gordon v. Calvert, 2 Sim. 235; S. C., affirmed, 4 Russ. 581; see Hough v. Warr, 1 Car. & P. 151.

⁽ⁱ⁾ Creighton v. Rankin, 7 Cl. & F. 325. The neglect of the bankers, in leaving in hands of the clerk, a larger sum than the surety had stipulated should be left, &c., &c., makes no difference. S. C.; see Lindsay v. Lord Downes, 2 Ir. Eq. R. 307; see 1 id. 448, 450, n. ^(k) Mills v. Alderbury Union, 3 Exch. 590.

^(l) University of Cambridge v. Baldwin, 5 M. & W. 580.

Reviewing the subject of this chapter, the truth seems to be, that a guarantee is extremely difficult to frame with sufficient circumstantiality to embrace every case that may arise; and it is impossible to lay down a general form which shall serve on every occasion, or even perhaps a form which shall serve for any other than the objects which the framer had in his mind at the time of constructing it. Very little more can be said for the purpose of guidance, except that each case is to rest upon its own circumstances; the practitioner being left to glean from the mass of decisions, the *proper mode of moulding the language, so as to [*277] adapt it to the purposes he has to meet.

As regards evidence of the liability of the guarantor in these cases, we may point out—

1. That an account delivered by his clerk, cashier, &c., charging himself, is evidence against the clerk's surety.

2. That in case *such* account is made out by the clerk, and he continues to receive payments on account of the banker, and subsequently pays in moneys, or takes credit for salary or disbursements, those payments, &c., are not necessarily to be first applied to extinguish the previous balance, *when* the subsequent receipts are equal to the payments, &c., in amount. (*m*)

[*278]

*CHAPTER VIII.

APPROPRIATION OF PAYMENTS.

A QUESTION has very often arisen, where a customer has a running account with a bank, the balance of which is sometimes for him, and at other times against him, how are the payments by the bankers to be applied?

Thus, in case of a banking partnership, where one partner dies, and the customer goes on dealing as before with the bank, there being no new account, nor any settlement made, and then the banking house becomes bankrupt, the account at the death of the partner being about 1,700*l.* in the customer's favour, but being, afterwards and before the bankruptcy, reduced by payments made by the bankers on his account, to about 450*l.* in his favour; but again showing a balance for him exceeding the former amount of 1,700*l.*, at the time of the bankruptcy;—are the payments made subsequently to the partner's death, by the survivors, to be applied in reduction of the balance due to the customer at that period, so as to discharge the estate of the deceased *pro tanto*, or are they to be considered as exclusively parts of the dealings between the survivors and the customer?

Now this question has been settled, once for all, by Sir W. Grant, M. R., in a decision which has been universally followed and acted upon in this way.

(*m*) *Lysaght v. Walker*, 5 Bli. N. Cas. 1.

The case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence, gives no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably it is the sum first paid in that is first paid out: it is the first item on the debit side of the *account, that is discharged, or reduced, by the first item on the credit side. [*279]

Indeed, this is the principle, on which all accounts current, and especially cash accounts, are settled; and any other mode, (as the Master of the Rolls shows,) would lead to extravagantly unreasonable results.(a)

If the customer intended that this usual mode of dealing shall be altered, or departed from, in any way, it is incumbent on him to signify his intention, to that effect, to the bankers; but if he receives his account as drawn out, as one unbroken running account, and makes no objection to it then it being the usage in the banking trade, to consider silence, on receiving an account made out, to signify the customer's acquiescence, in the correctness of the account in all respects, he cannot afterwards raise any objections.(a)

The case is strengthened if the customer draws cheques upon the bank, after the death, where there is no fund to answer those cheques, except the balance due to him, at the time of the death; for that is treating such balance, as the fund out of which his cheques, notwithstanding the death, were to be paid; and thus he furnishes distinct evidence, beyond the inference derivable from the nature of the dealings, and mode of keeping the account, that he gave express authority, that this balance was to be applied to the cashing of his cheques, *in the order*, in which they were presented.(a)

There is no difference between the courts of law and the courts of equity, on this question of appropriation; both adopt the same principle as the ground of their decisions;(b) and the rule is carried into effect, even where it operates to *the prejudice of a surety; even in that case, the earlier items of the account will be those, to which [*280] the earlier payments, are to be regarded, as appropriated.(c)

Distinct Accounts.—It is necessary, however, to keep in mind, that where there are distinct accounts kept, and the customer is overdrawn and makes a general payment, without specifically appropriating it *at the time*, and there is no course of dealing, or other circumstances, showing clearly how he must have intended to appropriate the pay-

(a) Clayton's case, 1 Meriv. 608-610, 611. See 4 Russ. 468; 3 Moo. & S. 175. The customer has a right to resort, for payment, of what is due to him, out of the estate of the deceased partner, to that estate, without regard to the state of the account, as between the deceased and the surviving partners. Devaynes v. Noble, 2 Russ. & M. 495.

(b) Bodenham v. Purchas, 2 B. & A. 45. See Simson v. Ingham, 2 B. & C. 72; Anon. Cro. Eliz. 68; Goddard v. Cox, 2 Stra. 1194; Bull. N. P. 174; Pinnel's case, 5 Rep. 117.

(c) Williams v. Rawlinson, 3 Bing. 71. See Ex parte Sharp, 3 Mont. D. & D. G. 490, where the bankers knew of the customer's act of bankruptcy before they took the security, the guarantor being ignorant of it.

ment.(d) that is not a case within the rule we have been stating, which applies only in case of a running unbroken account: that is a case in which the banker may apply the payment to which account he pleases;(e) and he is not bound to do it instantly, but may take a reasonable time.(e) On the other hand, if the customer owes the banker, on several accounts, and pays in money, he the customer, has a right to say *at the time*, to which debt the payment shall be applied.(e)

Partnership.—Surviving partners in a bank, may on the death of a partner, object to continue an account with a customer, as one unbroken account; and it is no proof that they have elected to treat it, as a continuance of the old account, to show entries in the bank books to that effect, if they were not, at the time communicated to the customer.(e)

The same principle applies when the partnership expires: thus, Brooke, a lieutenant-colonel in the army, employs one Gilpin, as army [*281] agent and banker, to receive his pay and *allowances, and also dividends on his stock, and other moneys on his account, and from time to time, to make payments to him or his order, for which purpose he was in the habit of drawing on Gilpin, who from time to time, sent in his account, to the employer.

Brooke continued to employ Gilpin, in this way, from some time before the year 1807, down to the year 1819, when Gilpin became bankrupt; no rest was being made, or balance struck in the account after 1st July, 1816; and during the whole period of the account, there was always a considerable balance due to Brooke.

On 24th September, 1807, Gilpin entered into partnership *for a period of ten years*, with one Enderby, but the business continued to be transacted in the name of Gilpin alone, and Brooke had no notice or knowledge of the partnership until after the bankruptcy of Gilpin; and the receipts and payments prior and subsequent to 24th September, 1817, when the partnership expired formed part of one general account.

Then on Brooke bringing an action against Enderby and Gilpin, to recover the balance due to him at the expiration of the partnership, it was held that (Gilpin having pleaded his bankruptcy,) Enderby was entitled to consider any sums paid by Gilpin after the expiration of the partnership, as being paid in reduction of the balance, then due to Brooke, and might take credit for them, without giving credit to Brooke, for any sums received after the expiration of the partnership, by Gilpin on account of Brooke.(f)

The rule is quite settled. On the one hand moneys drawn out on a banking account, are to be applied to the earlier items on the opposite side of the account. By every payment which he makes the banker discharges so much of the debt which he first contracted.(g) On the other

(d) See *Wilson v. Hirst*, 4 B. & Ad. 766; *Stoveld v. Eade*, 4 Bing. 154; *Lysaght v. Walker*, 5 Bli. N. Cas. 1; *Brown v. Anderson*, 2 Moo. P. C. 245.

(e) *Simson v. Ingham*, 2 B. & C. 72, 75. Entry in the customer's books not evidence of the appropriation by him. *Manning v. Westerne*, 2 Vern. 606.

(f) *Brooke v. Enderby*, 2 Bro. & B. 70. See case of navy agents, *Toulmin v. Copland*, 2 Cl. & F. 681. See also *Bank of Scotland v. Christie*, 8 Cl. & F. 227, 228: *Ex parte Toulmin*, cited 1 Meriv. 598.

(g) *Pennell v. Deffel*, 4 De G. M. & G. 391. The rule is the same whether the

hand, *moneys paid in by the customer, go in discharge of any debt which may be due on the account from him to the banker, [*282] at the time of his paying in the money; applying in like manner, any part payment to the discharge of the earlier debt.

It is equally certain, however, that a particular mode of dealing, and more especially any stipulation between the parties may entirely vary the case. Thus if a bond were given by several persons, including a customer, to secure bankers against advances which they might *from time to time* make, to the extent of 1,000*l.*, to the customer: that would show that the amount of it was not to be brought into the account, as one of the items, but that it was to be a continuing security, so that although between the date of the bond and the failure and bankruptcy of the customer, the balance in his favour had been larger than the amount due upon the bond, for principal and interest, that circumstance does not show that the sum in the bond is to be taken as paid off; (*h*) and the same might be the case, though the bond were not so worded, but if the conduct and expressions of the parties were such as to show that a continuing guarantee was contemplated. (*h*)

Legal Items.—If there be a running account between the customer and the bankers, and the bankers make large advances to him, part of these advances arising out of illegal and part out of legal transactions, and the customer, from time to time deposits bills and makes payments, without any specific appropriation, or any settlement of the account; it will be held that the payments must be applied to the reduction of the earlier items of the account, and the legal, and not the illegal part of the demand. (*i*)

*CHAPTER IX.

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LIEN.

WITH respect to questions of lien, the following may be stated, as, for the most part, indisputable propositions:—

The general lien of bankers is part of the law merchant, to be judicially noticed, like other parts of that law. (*a*)

Securities for Special Purposes.—A banker's lien does not attach, on securities, placed in his hands for a special purpose, *ex. gra.*, where exchequer bills are deposited, in order that he may receive the interest on them, and get them exchanged for fresh bills; for such special purpose is inconsistent with the notion of a general lien, inasmuch as the bankers undertake to do, what is usual for bankers to do, as regards the

account is kept with the customer, as regards his own money, or that of a cestui que trust; S. C.

(*h*) *Henniker v. Wigg*, 4 Q. B. 792.

(*i*) *Ex parte Randleson*, 2 Deac. & C. 534; *Wright v. Laing*, 3 B. & C. 165.

(*a*) *Brandão v. Barnett*, 12 Cla. & F. 787, 802, 806, 808, 810.

exchequer bills; in other words, they agree to return the bills, (or to do what is equivalent to returning them,) as soon as the particular thing, for which the bills have been intrusted to them, has been performed. Now, an undertaking to return a thing, by a given day or hour, is manifestly inconsistent with the claim of a general lien on the thing, by the party undertaking. It is according to the same principle, that if a customer goes to his banker, requesting him to get a bank post bill, for the purpose of transmitting into the country 1,000*l.*, which he hands over to him in bank notes, the banker, unless he expressly states that he receives the notes, only subject to his lien, has no right to retain, or apply them, to any other purpose than that for which he receives them.

[*284] But, unless there be an express contract, or circumstances *showing an implied contract, inconsistent with the principle of lien, bankers have a general lien on all securities deposited with them, as bankers, by their customers.(a)

Plate.—Accordingly, bankers have no lien, for the balance of their account, against a customer, on his *plate*, deposited in his chest, with them, for safe custody.(b)

Trust Deeds.—Nor can bankers carry into effect any lien, which they may prima facie have, upon securities deposited with them, which are, in fact, trust deeds. Thus, if a customer deposits title deeds, as a security for advances, and the property comprised in the deeds is subject to a trust, in breach of which the deposit is made, then, although the bankers have no notice of the trust, it must prevail, against their lien.(c)

Mistake.—Nor has a banker any lien on securities, by mistake, or casually, left at the bank, upon the occasion of an application to him, to advance money on them, which he had refused to do;(d) and if a customer has deposited securities, with his bankers, to indemnify them, to the extent of 1,000*l.*, then advanced by them, and afterwards becomes indebted to them, in an additional sum of 500*l.*, on his running account with them, they have no lien on these securities, beyond the 1,000*l.*, and interest.(e)

[*285] *Shares.*—Again, in such a case as the following, the *bankers have no lien. A., one of the trustees of a fund, holds certain shares, in a banking company, in his own right, and deals with, and purchases shares therein, to a considerable extent. A portion of the trust fund is invested, in shares, in A.'s name. There was no distinguishing mark, by which the individual shares could be traced, the whole being in the nature of capital, expressed by terms of quantity. A. then agrees to assign a certain number of the shares, standing in his name, to the banking company, as security for repayment of advances, which

(a) See note (a), previous page.

(b) See *argu. Ex parte Eyre*, 1 Phill. Ch. R. 235; also 12 Cl. & F. 794, 797; per Lord Campbell, *Brandão v. Barnett*, 12 Cl. & F. 809; and see *O'Connor v. Majoribanks*, 4 M. & Gra. 435. As to right to inspect contents of chest of heir looms, &c., *Earl of Macclesfield v. Davies*, 3 Ves. & B. 16.

(c) *Manningford v. Toleman*, 1 Coll. Ch. R. 670. See *Moore v. Jervis*, 2 Coll. Ch. R. 60.

(d) *Lucas v. Dorrien*, 7 Taunt. 279.

(e) *Vanderzee v. Willis*, 3 Bro. Ch. C. 21; *Zinck v. Walker*, 2 W. Bla. 1154; see *Ashton v. Dalton*, 2 Coll. Cha. R. 565.

had been made to him, by them : but no formal transfer was ever made. A. then becomes bankrupt, not having in his ownership, at the time, a sufficient number of shares, to satisfy the trust, and also to execute the agreed assignment, to the banking company.

Here the banking company have no lien, on any of the shares, which A. had held in trust ; and though the shares held in trust, being originally purchased with trust money, possibly might have been dealt with, by sale and repurchase ; the trustee must still be considered as holding, for the purposes of the trust, the same number of shares out of a larger number, which stood in his name at the time of the bankruptcy : and of the two equities, that of the *cestuis que trustent*, and that of the banking company,—no actual assignment of the shares having been made, pursuant to the agreement,—the former prevails, following the same rule in this, as we have seen adopted in other instances, and the *cestuis que trustent* are not bound to give notice of the trusts to the bank.(f)

On the other hand, as regards any shares in which A. was beneficially interested, the agreement to assign would give the banking company an equitable lien upon them as security, *so far as they would extend for advances to A., as against A.'s assignees on his bankruptcy.(g) [*286]

Nor can it be successfully argued, that, in case of a shareholder of a banking company, being a joint stock company, the shares are the subject of lien, in favour of the banking company, on the ground that the shareholder being a partner, then, in case he is indebted for advances, or might be found to be indebted, upon winding up and balancing the accounts, the bank have a right to retain the shares in order to secure themselves.(h) Even in the case of a common partnership, such a doctrine is to be taken with very great allowance ; because, in such case, there must be a winding-up and dissolution, *before* you can tell what one partner owes to another. But the very object of a joint stock bank is, to enable persons to enter and quit the concern, without the necessity of a winding-up or dissolution, and when you cannot tell how the account may stand between the parties :(h) and, therefore, in the absence of special provision in the deed of settlement, one of the shareholders borrowing of the bank, is put in the same position as any other customer.(h)

It appears not to be disputed, that the right which, by the deed of settlement, the directors of a joint stock banking company may have, of objecting to the transfer of shares cannot be exercised, for the purpose of exacting payment of a debt due to the bank, from the shareholder, whose shares are proposed to be transferred.(i)

(f) *Murray v. Pinkett*, 12 Cl. & F. 764 ; the certificates of the shares were indorsed, "160 Irish Provincial Bank Share Certificates ; name, John Wright, Esq., in trust for J. Johnson," id. 779. See 2 Hare, 127, 132.

(g) *Murray v. Pinkett*, 12 Cl. & F. 780, 781. See S. C., 2 Hare, 120, 127, 129. The shares held on trust could not pass to the assignees ; see 12 Cl. & F. 782.

(h) 12 Cl. & F. 783, 784 ; see 2 Hare, 120, 130, 131.

(i) *Pinkett v. Wright*, 2 Hare, 120 ; *Ex parte Caldecott*, 2 M. D. & D. G. 388, per Lyndhurst, C.

In the following case, from somewhat different facts, a different conclusion was drawn.

One of the provisions of the settlement deed of a banking company, was, that the company should have a lien on the shares of such proprietors, as were customers, and indebted *to the bank, and that no [*287] share should be transferred, without the consent of the directors. An abstract of these rules was indorsed on the certificate of each share.

In *such a company* the shares of indebted customers do not pass to the assignees of the customers, on their bankruptcy, so as to defeat the lien of the bank. (k)

In case, however, there had been no rule requiring the order of the directors for the effectual transfer of shares, and no stipulation for lien, &c., so that an owner would have had unrestrained power of disposing of his shares; there the shares would have been considered to be in the order and disposition of the owner at the time of his bankruptcy, and to pass to his assignees accordingly. (l)

Trust Moneys.—But a transaction, such as the following, gives a sufficient lien.

The trustees of a trust fund have an account with the East of England Joint Stock Banking Company, as such trustees. One of the *cestuis que trustent* has a private account with them, which is much overdrawn; upon their agreeing not to press for the reduction of the balance against him, he offers to give them a lien on the moneys coming to him in respect to his share of the trust fund: and to this they agree. Accordingly, he addresses a letter to one of the trustees, authorizing and requesting him to pay, to the credit of his (the *cestui que trust's*) account with the bank, such sums as might be awarded to him out of the trust fund. This was held to give the bankers a valid lien upon the proceeds of the fund, and being intended, by both parties, at the time it was given and received, to be irrevocable, must be considered in equity to be so to all intents and purposes. (m)

**Bills of Exchange.*—So if a customer lodges undue bills of [*288] exchange in the hands of his banker at Bristol, and draws upon them for any money he wants, in advance, the banker charging no interest on these advances, but selecting out of the bills such as were nearest in amount to the sum advanced and discounting these, debiting the customer with the amount of such discount, in his account, but without any special agreement to that effect; then there is nothing in these circumstances to invalidate the banker's right of lien, for his balance, on all *other* bills placed in his hands by the customer, (n) besides those that he discounts; and it seems to be universally true, that a customer cannot get back paper securities, in his banker's hands, without paying the

(k) *Ex parte Plant*, 4 Deac. & C. 160.

(l) *Nelson v. London Assurance Company*, 2 Sim. & S. 292; see 4 Deac. & C. 166.

(m) *Ex parte Steward*, 3 M. D. & D. G. 265.

(n) *Davis v. Bowsher*, 5 T. R. 488. This seems to have been the general usage of bankers, at Bristol, about the year 1794: but the court disclaimed deciding on the particular local usage.

balance against him, unless there be some special contract between the banker and the customer.

Title Deeds.—A., being entitled to one-third part of some freehold property, in his own right, and to another third part as heir at law to his brother, deposits the title deeds of the property with his bankers, as security for advances. The personal property of the deceased brother, who was a trader subject to the bankrupt laws, was insufficient to discharge his debts, and therefore *his* third of the property became, by virtue of a statute then in force, 11 Geo. IV. and 1 Will. IV. c. 47, s. 9, assets for the payment of his debts.

Nevertheless, it was held, that the banker's lien extended over both thirds of the property, in preference to any claims of the creditors of A.'s brother.(o)

Partnerships.—Bankers have no lien on the deposit of a partner, on his separate account, for a balance due to the bank from the firm.(p)

**Exchequer Bills.*—The rule is so strong, as regards the lien on securities, which come into the bankers' hands, *without being* [*289] *appropriated to any special purpose*, or intrusted to them for safe custody, or the like, that it attaches on bills and notes payable bearer, or on exchequer bills which pass by delivery, although the customer depositing them were not the real owner, and had no authority to saddle the property in them with a lien.(q)

Promissory Notes.—On the other hand, if I deliver promissory notes to a person to get discounted for me, and he carries them to *his* banker for that purpose, but the banker insists upon placing the notes to the credit of the customer, whose account shows at the time a balance against him, the banker will be obliged, in equity, to account to me.(r)

If bills of exchange be deposited, *indorsed*, with the bankers, they have the absolute power of disposing of them; if the bankers become bankrupt, although the customer may recover such of the bills as remain in *specie*, subject to the bankers' lien, for the balance of his account, yet he cannot follow the proceeds that may have been converted to the bankers' use.(s)

Realizing Lien.—Little has been decided to illustrate how the law provides that the banker is to realize and make productive his lien on securities, &c.

In case of any negotiable security, which comes to his hands on account of a customer to whom the banker is in advance, he has, as has been said, a lien or power of detention; and in order to make such power productive, he may *put the negotiable instrument in suit,(t) [*290]

(o) Ex parte Baine, 1 M. D. & D. G. 492.

(p) Watts v. Christie, 11 Beav. 546.

(q) Barnett v. Brandão, 6 M. & Gra. 630.

(r) See Lord Bolingbroke's case, stated by Lord Redesdale, C., Irel., in Joy v. Campbell, 1 Sch. & L. 346.

(s) Ex parte Pease, 1 Rose, 232; Ex parte Wakefield Bank, id. 243; see 19 Ves. 25, S. C. It is considered a discreditable thing for bankers to carry into the market bills which are specially indorsed, id. 251; and see Ex parte Leeds bank, id. 254; Ex parte Twogood, 19 Ves. 229.

(t) Bolland v. Bygrave, Ry. & M. 271; Bosanquet v. Dudman, 1 Stark. R. 1.

and recover upon it so much as will cover the balance due to him from the customer.^(u)

But, instead of advancing their remedy, bankers will destroy their right of lien, if after lien has been established they take a security, *which is payable at a distant day*, for the debt.^(x)

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*CHAPTER X.

PARTNERSHIPS AT COMMON LAW.

MANY questions arise in banking transactions, which are governed by the rules relative to partnerships, which prevail at common law. We shall at present consider, as well such questions as seem to be of importance to private banks, carrying on business in partnership, or under a firm, as such as usually arise in the business of, and as are of importance to bankers, of whatever class, who deal with firms of partners, as customers.

Cases respecting copartnerships in banking, under 7 Geo. IV. c. 46, as they stand upon different and special grounds, have been treated apart; and the same has been done with respect to joint stock banking companies.

Bankruptcy.—Three persons carry on business as bankers, in partnership, being interested in the concern in definite, but unequal proportions. The firm becomes bankrupt, but eventually both the joint and separate debts are paid in full, with interest. In order to accomplish this, however, the assignees sell real estates of one of the firm, to a large value, and on the whole, he contributes to the losses of the firm, upwards of 46,000*l.* beyond his proportionate share. Part of the estates were sold in his lifetime; part were contracted to be sold, but were not actually sold, at the time of his death; the remainder were sold after his death, and a surplus remained in the hands of the assignees. He died intestate; and his heir at law took out letters of administration.

Sir John Leach, M. R., held the real estate sold, or contracted to be sold, in the lifetime of the deceased partner, **must*, at his death, [*292] be considered as converted into personalty: but the real estate, which was unsold and uncontracted for at the death, descended to the heir, subject to the charges created by the bankrupt laws; and the surplus moneys in the hands of the assignees, to the amount of the produce of the property sold since the death, belonged to the heir, with interest.^(a)

(u) *Scott v. Franklin*, 15 East, 428. The lien is only, at most, co-extensive with the balance due, per *Eyre, C. J.*, *Bolton v. Puller*, 1 Bos. & P. 546; see *Giles v. Perkins*, 9 East, 12.

(x) *Cowell v. Simpson*, 16 Ves. 278; *Hewison v. Guthrie*, 3 Scott, R. 311; see *Stevenson v. Blakelock*, 1 Man. & S. 535.

(a) *Banks v. Scott*, 5 Madd. 493.

Acts of single Partners.—One of the partners in a bank causes stock, belonging to a customer of the bank to be sold out, by means of a power of attorney, which he forges. The proceeds of the stock were paid to the account of the banking firm at the house of the bank's agents, and were appropriated by the partner, who was afterwards *found guilty of other forgeries, and hanged*. His partners were in fact ignorant of the fraud, but might have known it by the exertion of common diligence. The customer was held to have an action against the partners for the amount.(b)

Also, in such a case, Courts of Equity, for the protection of those who deal with partnerships, *impute* knowledge, and hold the firm to be individually liable.(c)

So it has been laid down, that if one partner in a banking house collude with a member of a trading firm, in a transaction connected with the business of the bank, the banking firm are liable to the trading firm for any damages which the latter may have suffered by reason of such transactions. The plaintiffs, Longman & Co., booksellers, &c., banked with Pole & Co. On a certain day, Hurst, a partner in the plaintiff's house, sent cash to the bank, in order to take up three bills of exchange, accepted by him in the name of the firm, and coming due next day. The bills were taken up, but, by Hurst's order, were not entered in the books of Longman & Co. About the same period, it *appeared [293] in evidence, Downes, a partner in the bank, told one of the clerks that a bill of Longman's would come in on such a day, which was to be paid, and given over to him (Downes,) and that he was to debit Hurst with it in the *note book*, in which private transactions were entered, so that it might not go into the ledger. Downes soon afterwards gave a similar direction, respecting another bill of the same kind; and these bills were entered into the note book accordingly, and the cash payments were entered in the same book to Hurst's credit, and consequently, no trace of these transactions appeared, either in the pass book of the bankers, or in the cheque book of Longman & Co. Hurst afterwards retired from the partnership, receiving the full amount of his capital, and became bankrupt. Longman & Co. were subsequently obliged to pay bills accepted by him in the name of the firm, to a very large amount. An action was considered to be clearly maintainable by Longman & Co. against Pole & Co., in respect of the damages arising to the former, out of the collusion of one of the latter firm with Hurst.(d)

Where one of several partners in a banking-house drew a bill in his own name upon a third party, who accepted it, upon condition that the drawer should provide for it when due, the firm were adjudged to be bound by this act of the partner, and they were not allowed to sue the acceptor; for the partner, not having performed the condition on which the acceptor accepted, could not have done so, and they could not be in a better position than he was.(e)

(b) March v. Keating, 2 Cl. & F. 250.

(c) Sadler v. Lee, 6 Beav. 324.

(d) Longman v. Pole, Danson & L. 126; S. C., Moo. & M. 223.

(e) Sparrow v. Chisman, 9 B. & C. 241.

One of several partners, on receiving twenty shillings from a person, hands to him a ticket in the Double Exchange Lottery, undertaking to pay over to him whatever benefit should turn up on it; the ticket comes up a £40 benefit; the partner refuses to pay over; the firm are held to be liable; the transaction being in the *then* usual course of *business, and there having been no disclaimer of the partner's act.*(f)* This decision turns on the principle of law by which all the firm are made responsible for the particular undertakings or contracts of each, relating to business transacted by the firm; and this is the case, even where the business, so transacted, is out of the regular course of the bankers' business, the circumstances being such as to bring the undertaking or contract within the scope of the authority of the partner, who undertakes or contracts.*(g)* Thus, where a customer of A. and B., who were in partnership, as navy agents, employed them to purchase an annuity for him; but A., unknown to B., guaranteed the punctual payment of the annuity: it was held that B. was bound by the engagement of A., since both were acquainted with the fact of the purchase of the annuity, although it was out of the regular course of the business of the firm.*(g)*

It has long been understood to be an absolute rule, that one partner has not power to bind the partnership by deed, in the absence of authority;*(h)* and as it may, and does sometimes become a question, in cases of deeds of composition with creditors, and other cases, how far a deed, executed by one, in the name of the firm, is binding on the partnership, it may be desirable to remind the reader of several points relative to this question.

1. At law, the above rule seems to remain unshaken.

2. In equity, it has been held *in one case*, that one partner, having always authority to contract by simple contract, on behalf of the firm, may so contract, that the firm shall execute a deed, &c., and that if that one execute the deed, then, though the other partners expressly refuse, the obligee *may prove in bankruptcy* against the joint estate.*(i)*

*3. Also it has been held in equity, that a deed commencing [*295] "Know all, &c., that we, Mayne and Co., of, &c., are held and firmly bound," &c.; and of which the condition was such, "that if the above bounden Mayne & Co., their heirs, executors, or administrators, shall and do well and truly," &c.; and which was executed, by one of the firm only, but he executed with the privacy of the other partners, who were all present at the execution,*(k)*—bound the partnership.

(f) — v. Layfield, Salk. 292; see 1 Stark. R. 88.

(g) Sandilands v. March, 2 B. & A. 679; see Brettel v. Williams, 4 Exch. 625; and see 3 H. Lds. 266; 5 Q. B. 833.

(h) Harrison v. Jackson, 7 T. R. 207.

(i) Ex parte Bosanquet, De G. Bank. R. 432.

(k) Burn v. Burn, 3 Ves. 573; see 1 Meriv. 720, and Jones v. Mars, 2 Camp. 305. The question, whether the execution, at the banking-house, by one of the partners, thus, "For self and partners, S. G. Smith," there being no evidence of any express assent or dissent of the rest of the firm, bound the firm, the deed thus executed being a deed of inspectorship between a debtor and his creditors, so as to operate to discharge a surety, arose, but was not decided, in Smith v. Winter, 4 M. & W. 454.

One of several partners in a banking house dies; a customer, two months after the death, having notice thereof, draws a cheque, on the house, in the name of the old firm, which was paid to the bearer; no other receipts or payments took place, until the bankruptcy of the partnership, nine months after the death, under which the customer proved for the balance remaining due to her, and received dividends thereon, which reduced the debt to £216; the question was, whether, for this amount, the deceased's estate was liable.

Now, a partnership contract, being *in form only* joint, is held to produce only a joint obligation, which consequently attaches exclusively upon the survivors.^(l) By the mercantile law, that is, according to the prevalent ideas of obligations and rights, governing the commercial law of Europe, a partnership contract is several as well as joint.^(m) As to equity, the doctrine laid down formerly seems to have been, that the creditors of the firm had no claim against the estate of the deceased partner, except when the surviving partners were, at the time, or subsequently *became, insolvent or bankrupt.⁽ⁿ⁾ But this view has long been departed from. It is now held in equity, that partnership debts are joint and several;^(o) and in a suit by a creditor of the firm, against the representatives of a deceased partner, and the surviving partner, the creditor is entitled to satisfaction out of the assets of the deceased partner, though it be not proved, that the surviving partner was insolvent;^(o) and there being no difference in principle, between a banking partnership at common law, and any other partnership, and no new contract arising from the customer leaving the money in the bank, after the death, the customer was held entitled to receive the balance above mentioned, from the deceased's separate estate.^(l) [*296]

Under the circumstances already mentioned, it was laid down also, that the partnership having wrongfully sold some exchequer bills, deposited with them, in the lifetime of the deceased partner, and presumably with his privity, the transactions being entered in the books, and the death of the partner not taking place until five months afterwards, and the produce being applied to the use of the house, the amount became a partnership debt, accruing from the moment they were sold without the consent of the creditor, and interest was allowed at 5*l.* per cent., from the time of the sale. The question, whether or not the individual partners were privy to the sale, was regarded as immaterial.^(q)

So in the same case, it was held that creditors, in respect of stock, standing in the partnership name, which was sold in breach of trust, and

(l) Sleech's case, 1 Meriv. 564; Story, Partnersh. s. 361; Richards v. Heather, 1 B. & A. 29.

(m) Colly. Partn. 404, 2nd edit.; compare cases, n. (l), supra.

(n) Colly. Partnersh., 404-408, 2nd edit.; Story, Partnersh. s. 362.

(o) Wilkinson v. Henderson, 1 My. & K. 581. If a customer has dealt with a banking house, under the firm of J. Teed, T. Teed & Co., then J. Teed alone cannot, at law, sue for a balance, though T. Teed be a minor. Teed v. Elworthy, 14 East, 210.

(q) Clayton's case, 1 Meriv. 579, 580; see Reg. v. Strahan, supra, 148.

the proceeds applied to the use of the house, were entitled as against the estate of the deceased partner, either to regard the amount as a debt, or [*297] to have *the stock specifically replaced, at their option; and the same would be ruled if the stock stood in the name of one partner only, and was sold by him only, the proceeds going as before, to the use of the house.(r)

So in the same case, it was held that exchequer bills, having been deposited by a customer, under an agreement to return them, or other bills in lieu of them, when paid off by the government, and the bills were sold, some in the lifetime of the deceased, and others after his death, the deceased's estate was not liable in respect of the amount of the latter debt.(s)

A lady having an account with a banking house, consisting of several partners, was advised by one of them to dispose of certain Dutch bonds, of which she was possessed, and to place the proceeds on better security; he suggested also that the money should be lent to his son. In this plan the lady acquiesced, in consequence of the great confidence she had in the firm, and gave the partner a cheque upon the bank, for the money, payable to a third person named, or bearer, and received a promissory note for repayment, with a guarantee from the partner, who afterwards absconded, and the security proved worthless.

On the lady filing a bill in equity against the remaining partners, it was held that they were *not* liable for the loss, because the transaction was not within the scope of a banker's business, and was not recommended or sanctioned by the other partners.(t)

In the following case, where the person obtaining the money was sole manager, not partner, a court of law decided differently. The wife of a person resident abroad, herself resident in England, had a "deposit account" with a joint stock bank; the arrangement being, that a customer, having such an account, never drew cheques, but the bank [*298] *gave "a deposit receipt," when the money was lodged, and the customer might, at any time on presenting the receipt, with his name indorsed on it, obtain his principal and interest, up to the day of repayment. The manager represented to her, that the bank had an equitable mortgage on some houses, &c., subject to a mortgage for 400*l.*, and advised her to purchase the houses for 595*l.*; 400*l.* to be paid in discharge of the mortgage, 195*l.* to the bank. Her accounts with the bank showed 775*l.* in her favour at that time. Out of this, the adviser being manager of a branch bank, where none of the members of the company resided, drew out of the bank 595*l.*, by presenting the deposit receipts indorsed, &c., at the counter, a fresh deposit receipt for 180*l.*, the balance remaining due for principal and interest, being handed to the customer. The manager absconded with the money.

When the customer sued the bank, although it was urged that this transaction was not within the scope of banking business, and that the

(r) Baring's case, 1 Meriv. 611, 612.

(s) Houlton's case, 1 Meriv. 616.

(t) Bishop v. Countess of Jersey, 2 Drewry, 143; S. C., 23 L. J., Chanc. 483; see Thompson v. Bell, 10 Exch. 11.

manager was not authorized to sell property of the bank, the jury found the manager to have intended to make the plaintiff believe, and that she did believe him to be acting as agent to the bank, and the court, therefore, held the bank to be responsible for the money.(q)

A testator was member of a partnership, at will, in a bank; there being no provision entitling the executor of a deceased partner to an interest in the good-will of the concern. It was stated that the credit, in which the bank was, at the time of the death, was so good, from the well-known wealth of its members, that it was unnecessary that the partners should retain, at the banking house, any considerable surplus of assets, above the liabilities; and in fact the whole assets of the partnership, then and for some time previously, exceeded the liabilities by a small amount. The bank was a bank of issue, as well as of deposit; and the *profits of the partnership arose from the employment, at interest, by way of loans, to customers, on overdrawn accounts, and otherwise, and investment in other modes, of moneys placed in their hands, by way of deposit, and of the amount of their notes in circulation. [*299]

Each of the partners was entitled to one-third of the assets of the partnership, and liable to the payment of one-third of the liabilities thereof.

The testator's share in the assets at his death, was much exceeded by the balance of his account as a customer with the bank, and due from him to the concern. After his death, the surviving partners admitted into the firm his son and executor; but they did not admit him *as executor*, and the business continued to be carried on as before the death, without any separation or appropriation of the partnership assets, as they stood at the death.

In a suit against the executor for the administration of the testator's estate, the Court of Chancery held him not to be accountable to the testator's estate for the profits which he had received as a partner; in fact, deciding that the good-will in the bank, placed in the circumstances above detailed, having, in fact, no capital, and the testator having died indebted to the bank, was worth nothing.(r)

After the testator's death, a number of notes of the old firm were re-issued. By the notes so re-issued, however, it is not to be assumed that the testator's estate would have been bound; most probably it would not; on the other hand, it is probable these notes obtained currency, in some degree, from the use of the testator's name upon them.

The case was said, by Lord Justice Turner, to involve questions of very great importance, (which the court on that occasion were not called on to decide,) as to what is to *be considered as capital of an outgoing partner, with reference to a banking concern.(s) [*300]

Partnerships in other Firms.—A question sometimes arises when several partnerships are carried on under the same name, but having, in

(q) *Thompson v. Bell*, 10 Exch. 11.

(r) *Simpson v. Chapman*, 4 De G. M. & G. 154; the delay in making the claim was, in some degree, relied on by the court.

(s) 4 De G. M. & G. 169, 170.

fact, separate businesses and concerns; and bills drawn under the name of the firm, common to them all, but in which, for some of the purposes all of the partners of the several partnerships are not members, are discounted by the bankers; then against whom are the bankers to proceed in case of dishonour?

Now, if a firm of A. & Co. trades in the above manner, and the partnership name and style or firm appears pledged to a bill, all the partners, whoever they may be, and whether known or secret partners, will be bound, supposing the case to be free of facts operating to impeach the title of the party who seeks to charge them.^(t) This is a well-established law. Hence, where a bill was drawn in the name of "James King & Co.," and an indorsee sued on it, a person who was a partner in that firm, and it also appeared that there were other partnerships carried on under the firm of "James King & Co.," in which the other drawers of the bill were concerned, but in which the defendant had no share there; although he offered to show the bill to have been drawn, *not* on account of the partnership in which he was concerned, but on account of one of the others, and that he knew nothing of it, he was considered to be liable on the bill; for he had traded with the other partners, under that firm, and persons taking bills under it had a right to look to him for payment, although they had taken without his knowledge. The defendant was sued alone, because the other partners had become bankrupt.^(u)

[*301] Even if the several partnerships do not trade, generally, *under one name, but conduct a particular business, apart from their general trade, in respect of which they negotiate bills under one name, which is that of one of the firms and not of all the firms collectively, the same holds good.

Thus, in the instance of a Scotch case, which was finally disposed of in the House of Lords. Hugh Mathie & Co. carried on trade as a partnership at Greenock. Another branch of trade was conducted by Mathie and Fleming, between that place and Nassau, New Providence; Fleming having no share in the partnership of H. Mathie & Co. The Nassau trade was carried on at Greenock by Hugh Mathie & Co.; at Nassau, by one Home; and at London, by Fleming & Co. Mathie kept separate accounts for the concern.

Certain bills had been discounted at the branch of the Bank of Scotland, in Greenock, subscribed H. Mathie & Co., and no explanation was required or given at the times of the discounts.

H. Mathie & Co. failed, and the agent of the bank, on the ground of his having given credit to Fleming, as included in the firm, made his demand on Fleming. A proof was taken, and the Court of Session was satisfied that Fleming was not a general partner with H. Mathie & Co., but that bills, having formerly been discounted under that firm for the use of the Nassau concern, and sanctioned by Fleming, a credit was raised, entitling bill-holders to rely on his credit, and he was accordingly held to be liable; and the House of Lords confirmed the general princi-

(t) See 1 Cro. & J. 318.

(u) Baker v. Charlton, 1 Peake, 111; see *Ex parte Mayer*, De G. Bank. R. 632.

ple of the decision; which seems to be that where several partnerships, consisting of different individuals, carry on business under the same firm, and enter into negotiable securities under the same signature, the holder of such securities has a right to select which of those partnerships he chooses for his debtors, though he cannot take all the partnerships as his debtors.^(x)

*Two, of three partners, are members of a joint stock banking company. A joint fiat in bankruptcy issues against their [*302] firm, which is jointly indebted, at that time, to the banking company; which, though itself insolvent, was held entitled to prove against the joint estate of the three partners;^(y) and so it would have been if the firm had consisted of a single member of the banking copartnership.^(z)

Two of the partners, carrying on business as the Horseley Coal and Iron Company, also carry on trade—distinctly from the former—as bankers. They are not the ordinary bankers of the company. They lend to the company several sums of money at interest, without security, under circumstances leading to the inference, that the advances would not have been made unless the bankers had been partners in the company.

On the bankruptcy of the company, it was held (in the absence of evidence, except such as the nature of the transaction itself furnished, to show that the character of a banking transaction belonged to it,) that these advances were not made by the bankers in their character of bankers, and were not, therefore, dealings between trade and trade, entitling them to prove against the estate of the company.^(a) The conclusion that these were not in the nature of banking transactions, does not rest on their unusual and improvident character; that could not deprive them of the nature of banking transactions, if it could be shown aliunde, that they were so.^(a) However, it cannot be said, that every thing which a banker does, with money or bills, is a dealing in the trade of a banker, because it is a dealing with money; although it is true that it is the trade of a banker to deal in and with money.

**Libel*—Bankers, in partnership, may join in maintaining an action for a libel against them, in respect of their business, and [*303] touching their credit, without disclosing the ratios, or shares, in which each of them is interested in the concern; for there cannot be, it would appear, any separate damage; the business injured is the joint business; and the libel only affects the partners through their business; then the defendant has nothing to do with their respective proportions of interest in the business; it is nothing to him how the compensation they may recover, will be divided among them.

It was also held, that to say of a banker that he has suspended payment, is actionable; for it is saying that he cannot pay his debts; and a

(x) See Colly. Partnersh. 271, 272.

(y) Ex parte Law, 1 M. D. & D. G. 16.

(z) Ex parte Caldecott, 2 M. D. & D. G. 368.

(a) Ex parte Williams, 3 M. D. & D. G. 433, 446.

temporary inability to pay debts, is insolvency; and such action is maintainable, without setting out or showing special damage.(b)

Dissolution.—A firm of partners in banking, agree to dissolve; and a deed is prepared and executed, by which two of the firm retire, and the other two members of it stay in the business, taking the concern in its actual state, and covenanting to indemnify the retiring partners against all liabilities. The dissolution and retirement of the partners took place as though the partnership was solvent; but in law, the concern itself not being equal, with its own assets, to the payment of its own engagements, the partnership was insolvent at this time, although the partners might have separate property sufficient to pay the joint debts, and the retiring partners must be taken to have known this; but, nevertheless, either of them having been obliged to pay debts, which the continuing partners had indemnified them against, would be entitled to prove for the amount so paid, under a *fiat* against the remaining partners.(c)

[*304] **Change of firm.*—We may mention here a principle of the law of partnerships, which it is very material for members of banking copartnerships, at common law, to bear in mind, in order, in case of a change, by retirement or death, in the firm, that the position of the retiring partners may be properly secured.

The principle is thus laid down. If a creditor receive interest from the new firm, for a debt due from the old one, this is not, necessarily an adoption by him of the new firm, as his sole debtors.

Thus, if the change be occasioned by death, and the creditor of the old firm receives interest for his debt from the new firm, it is quite clear, this fact, by itself, will not discharge the estate of the deceased partner.(d)

If the change be occasioned by the retirement of a partner, the same holds good. The following case is an instance in proof:—

A customer of a bank, consisting of three partners, has a considerable balance in his favour, for which he holds the accountable receipts of the firm. Then one of them retires, and the balance of the customer's account is brought forward into the concerns of the new firm, without, however, consulting the customer; but he knew of the dissolution, and continued to deposit money in the bank, after the new partnership commenced business; for which new deposits he had the accountable receipts of the new firm sent to him from time to time; and each time that a balance was struck, the interest upon the whole sum, as well that part of it which was deposited before, as that part which was deposited after the new partnership began, was calculated, as upon one aggregate sum without distinction, and he applied for and received at various times, several sums of such interest from the new firm, calculated as just mentioned.

[*305] **Then the new firm became bankrupt: and upon the customer suing the retired partner, for the amount of the balance due at*

(b) *Forster v. Lawson*, 3 Bing. 452.

(c) *Ex parte Carpenter*, Mont. & M'A. 1. Evidence of change in firm of Indian bank, *Hart v. Alexander*, 2 M. & W. 484.

(d) *Daniel v. Cross*, 3 Ves. 277. As to account by representatives of deceased partner against survivors, see *Richardson v. Bank of England*, 4 My. & C. 165; *Toulmin v. Copland*, 3 Y. & Col. Exch. 643.

the retirement, these circumstances were held not to constitute sufficient evidence of the customer's assent, to transfer the credit from the old firm to the new, and so adopt, as his debtors, the new firm, to the release and discharge of the old.(e)

If, upon a change of the members, the balances of the customers of the old partnership be transferred from the books of the old firm to those of the new firm, without any special agreement as to the manner in which payments made by the customers were to be applied, but under a general understanding amongst themselves, that the new house was to be responsible for the debts due from the old: the new house cannot appropriate payments made by customers since the change, in their own favour, but will be bound to apply them in liquidation of the balances due from the old firm.(f)

When a partnership is dissolved by the death of a partner, the accounts of the partnership may be taken in equity, in a suit by the survivors against his executors, or vice versa; or even in a suit against the executors by the separate creditors of the deceased.

A., a partner in a banking-house, and also in business separately as a trader, dies, and in a suit by his separate creditors against his executors, the bankers claimed to prove the balance due to them from A.; and they were held to be entitled to do so, although, as the partnership included A., they could not have sued him at law, in his separate capacity; and the reason is, because, when an account is decreed, the equitable creditors have a right to be satisfied, *and no distribution of assets [*306] can take place, until the accounts of all the creditors, of every description, have been gone into.(g)

A corresponding principle applies also, when the firm is changed by admitting new partners: and in such case also, it has been decided, that if a banking firm make payments for a customer, professedly, and as far as they were aware, with his authority: these payments being made to a person who was then acting as the customer's solicitor; but, in truth, these payments were made without authority; and they are debited to the customer in his account, and then the firm takes new partners, and the balance of the account is carried forward into the books of the new firm, but the old account is not closed, nor a new account opened, with the new firm;—the new firm is not liable to the customer for the amount of such payments, unless there have been an agreement between the two firms and the customer, that the new firm shall take upon themselves the actual liabilities of the old firm.(h)

(e) *Gough v. Davies*, 4 Price, 200. The retiring partner ought to have obtained a formal release from the customer; see also 6 Exch. 287, and 15 M. & W. 444.

(f) *Toulmin v. Copland*, 3 Y. & Col. Exch. 625, thus applying the principle of *Clayton's case* to cash accounts between partners themselves. S. C., 7 Cl. & F. 375. This was a case of navy agents.

(g) *Paynter v. Houston*, 3 Meriv. 302; see *Milford v. Milford*, McClel. & Y. 150. As to proof of partnership between bank and a colliery, 5 Ves. 308, 309, 696; 5 Hare, 388.

(h) *Craufurd v. Cocks*, 6 Exch. 287. As to presuming that new firm adopt debts of old, *Ex parte Sandham*, 4 Deac. & C. 818.

Firms as Customers.—With respect to dealings by banks with partnerships, as customers, it seems desirable to state here some of the cases of common occurrence, in the hopes that they may be found available for the guidance of banks in the management of their business.

Ashby and Rowland carry on business as partners, having an account with a bank in their own names. They then take one Shaw into partnership, without, however, giving notice to the bank, or altering the title of their account, and without making any rest in the account. The transactions at the banking-house were with Rowland personally. The bankers never had notice that Shaw had been or was a *partner, [*307] until the dissolution of the partnership, when notice, signed by Ashby and Shaw, was sent them, that Rowland having withdrawn from the firm, no transaction to which he was a party, could be recognized by them. Before Shaw became partner, Rowland had indorsed a bill of exchange, in the partnership name of Ashby & Rowland, to the bankers, who discounted it, and placed it to the credit of the account. After Shaw became partner, and before the dissolution, Rowland indorsed two other bills in a similar manner, which were discounted, &c., as before. The balance of the account at the time of the dissolution, was £60 5s. 3d., against the partnership. The proceeds of all the three bills were intended to be devoted by Rowland to other than partnership purposes, but of this the bankers had no knowledge, and nothing appeared that could have raised their suspicions of it. The question was, how far Shaw was liable to the bankers on these bills, and it was decided that he was not liable on the bill, which was indorsed and discounted before he came into the firm, but he was liable on the two other bills; for it was said that each partner might have limited the authority of his co-partners to bind him, by giving notice to the bankers; he was also held liable upon so much of the cash balance as became due after the day on which he became a partner.(i)

A firm of partners agree that one of the partners shall retire, the assets being transferred to the continuing partners, who shall take upon themselves the liabilities, and that the bankers of the firm, (whose account is overdrawn,) shall release the retiring partner. The bankers sign a memorandum, acceding to this arrangement. They cannot afterwards make the retiring partner a bankrupt, on the ground of this debt; for the partner having, by the agreement, to which the bankers were parties, been induced to give up his share in the partnership property, and to denude himself of the means of payment of the debt, it is contrary [*308] to equity that they *should be allowed to proceed as if they had never caused him so to act; and they will be restrained, by injunction, from so proceeding.(k)

One of two partners draws bills of exchange, *in his own name*, which he gets discounted by a banker, through the same agent who obtained from the banker the discount of other bills drawn in the partnership firm. The banker made no distinction between the bills, conceiving they were all drawn on the partnership account. The partners resided at

(i) Vere v. Ashby, 10 B. & C. 288.

(k) Attwood v. Banks, 2 Beav. 192.

Warminster, the banker carried on business at Salisbury, and was not acquainted with them. The proceeds were remitted, by the above-mentioned agent, and paid to the partnership account, and applied to the partnership use. But this circumstance was held to make no difference; the only party liable, for the bills, drawn by the one partner, was that partner; the bills, considering the transaction as a discount, were his only; the partners, as such, had never said or done anything to induce the banker to believe it to be a partnership concern, and to lend his money on that account; and, in the absence of any express contract between the parties, it was treated as a mere discount of the bills; the money advanced being advanced solely on the security of the parties whose names were on the bills, and as a matter of discount, not as a loan, to the partnership. The banker never considered himself as lending money to them on the security of the bills, as he had never made any entry in his books, charging them as his debtors. His discounting the bills amounted, therefore, to a purchase of them.^(l)

If a single joint speculation be set on foot, between A., B. and C., who are not general partners, and each is to contribute his third part, not of the capital, for no joint fund is raised for the speculation, but of the expenses; and A. was always ready with his advances, and paid his proportions when called upon, A. is not liable to the bankers *of [*309] B., (who were also the bankers of the joint speculation,) for moneys advanced by them on the individual credit of B., without the knowledge of A., though such moneys were applied, in payment of bills accepted, payable at the house of their London correspondents, and drawn upon B., in the course of the transactions belonging to the joint speculation.^(m)

In cases like this, the bankers, when the real relation between the parties is known to them, (which was not the case in the above instance,) ought, for their own security, to ascertain, and to be satisfied, that, in paying bills, &c., they are advancing money, not only for the use of *all*, but also with the knowledge, and at the instance of *all*, otherwise *all* will not be liable to repay the money; for the bankers will not be able to represent themselves as having been deluded, by the prospect of having a joint, or partnership security; nor will they be able to say, "we relieved you from a liability, by the payments we made, and have, therefore, a right to look to you for repayment;" for one person cannot pay the debt of another, and by that means make the other his debtor, unless the payment be made at the request of the other.^(m)

Articles of partnership were entered into between A., and three other persons, by which A. had power, if he died before the termination of the partnership, to bequeath a part of his share to one of his sons, &c. A. died, having bequeathed this part to such of his sons as his wife should appoint, and making his wife, and two of the partners, executors.

During A.'s lifetime, the partnership borrowed money of their bankers, and deposited, as security, the title deeds of real estate belonging to

(l) *Emly v. Lye*, 15 East, 7, 11, 13.

(m) *Smith v. Craven*, 1 Cro. & J., 500.

the partnership. At A.'s death, a large amount was due to the bank : A.'s sons were minors ; the banking account was continued without alteration ; A.'s capital was continued in the concern of the partnership, [*310] which sometime afterwards became bankrupt, being greatly *in advance with the bank. However, the amount which they had paid in, since A.'s death, exceeded the sum due to the bank, from A. and his partners, *at that time*, and it was considered, therefore, to be clear, that this discharged the lien, of the bank, on the estate of the firm above mentioned, and operated as payment of the balance, due to them, at the death of A., against whose estate, therefore, they retained no claim whatever.⁽ⁿ⁾ The effect of the arrangement entered into, at A.'s death, by the surviving partner and the bank, being interpreted to be, that the account should go on, as it had gone on before, not between the bank and the surviving partners, but between the bank and the new firm : the result was, the bank took the new firm as their debtors, and the new firm had paid off and discharged, the whole of the debt, that was due by A.⁽ⁿ⁾

Where a partnership keep an account with a banker, and a new partner comes into the firm, he cannot transfer, a part of the assets of the old firm, to his separate account, without the authority of the firm, so as to discharge the banker.^(o)

A partnership, consisting of A. and B., trading under that name and style, is largely indebted to their bankers ; B. dies, and A. continues the business, under the same name and style, and afterwards indorses several bills of exchange to the bankers, in the partnership name and style ; A. then becomes bankrupt : the bankers were allowed to prove for the amount of these bills, against the separate estate of A., notwithstanding it was urged, that the circumstances furnished an inference, that the bills were indorsed, in respect of a partnership transaction.^(p)

Another partnership, consisting of two persons, Cross and Cheshire, had a joint account, with their banker, in the partnership name ; Cheshire had also a private account with him. In December, 1846, the [*311] banker applied to Cheshire *for 268*l.*, as being the amount of the balance against the firm : Cheshire wrote, in reply, saying that the balance arose from a debt of his own, and had nothing to do with the partnership account. In October, 1847, Cheshire gave the banker, a promissory note for the above sum, being the balance still due. This note having been dishonoured, and Cheshire having become bankrupt, the banker sued Cross, who was compelled to pay the amount. Cross was held to be entitled to sue Cheshire, for this sum, as money paid to Cheshire's use ; the jury having found the debt, for which the promissory note was given to be his own, and not to be connected with the partnership accounts.^(q)

The fact of one of two partners having opened an account with a bank,

(n) *Fearenside v. Derham*, 8 Jur. 633, 639 ; *Bank of Scotland v. Christie*, 8 Cl. & F. 214.

(o) *Ex parte Hanson*, 18 Ves. 231.

(p) *Ex parte Wilson*, 3 M. D. & D. G. 57.

(q) *Cross v. Cheshire*, 7 Exch. 43 ; see 5 Exch. 489.

in his own name, is not conclusive, to show the account to be opened, in his own behalf merely. The banker may prove that the customer was acting as agent of the partnership, and that the account was a partnership account. On the other hand, the mere circumstance of the money deposited, being partnership money, is not sufficient to prove the account to be a partnership account.^(r)

The fact of one of many co-adventurers, in a mining concern, who has assumed the management of the adventure, opening an account with a bank in the name of the adventurers, does not show that he is expressly authorized by them to do so; and as there is in general, no implied authority in mining adventures, by which any one of them may pledge the credit of the rest, for money borrowed, although for the purposes of the mine; if the account is overdrawn, the bankers have no remedy for the balance, by way of action against the co-adventurers.^(s)

*A. and B., partners in trade, keep a joint account with a bank, B. having also a separate account with them. The partnership having overdrawn their account, B. dies, and A., as surviving partner, becomes bankrupt: at the time of B.'s death, the account against the partnership was 15,000*l.*, but B.'s private account gave a balance of 400*l.* in his favour. It was held that the bankers had a right in equity, to go immediately on the separate estate of B., but they had not the right to retain against the executors, who had commenced an action against them, to recover the balance due to B.'s separate estate.^(t)

A firm of two partners have an account with a bank, which shows a balance in their favour at the time of the death of one. Then the survivor draws out a portion of the sum owing to the firm, placing it in the hands of trustees, for the completion of a previous arrangement entered into for partnership purposes, upon the understanding, that if the arrangement went off, the money should be returned; the arrangement does go off, and the surviving partner becomes bankrupt, the money still remaining in the hands of the trustees. It is part of the joint estate of the two partners, not of the separate estate of the survivor. This case illustrates, if illustration be needed, the relation of the bankers of a firm to the surviving partners; money due to the firm, in the bankers' hands, is the money not of the survivor alone, or of the survivors jointly, if there are more than two partners in the original firm, but of the survivor, and the representatives of the deceased partner.^(u)

Such are the relations of the representatives of a deceased partner, in a firm employing the bank, to the banking house.

It is always essential for the bankers, to ascertain who are the true members of the firm, to whom they give credit, and to be able to show, either that there is an *actual* partnership subsisting between any body,

(r) *Cooke v. Seeley*, 2 Exch. 746. See effect of pass book as evidence, *Robey v. Howard*, 2 Stark. R. 555.

(s) *Rickett v. Bennett*, 4 C. B. 686. The course of dealing, and the nature of the concern, were left to the jury, to consider whether they afforded grounds for implying authority, in the managing adventurer, to borrow, &c.

(t) *Stephenson v. Chiswell*, 3 Ves. 566.

(u) *Ex parte Leaf*, 4 Deac. 287.

[*313] or number of persons to whom *they have given joint credit, or that the parties held *themselves* out as being in partnership, or jointly responsible as partners.(x)

Notice.—In case of a joint-stock banking company, the fact of one of the directors of the company being one of a firm dealing with the bank, is not notice actual or constructive to the bank, of a change in the firm, by retirement of one member. In case the bank had been an ordinary partnership, it would have been otherwise.(y)

There may be cases in which bankers may safely, perhaps, make advances to the directors of a joint-stock company, on their personal guarantee, who have by the constitution of the company, no power to borrow; namely, where the money is advanced, not for the payment of debts of the company, but for the purpose of carrying on the business of the company in its ordinary course; for in such case, although the advances do not constitute a debt due from the company to the bankers, yet the directors, being trustees, and in that character entitled to indemnity, from their *cestuis que trustent*, against expenses bona fide incurred, will be allowed for such expenses, on winding up the affairs.(z)

[*314]

*CHAPTER XI.

BANKRUPTCY.

BANKERS are found to be concerned in so many cases of bankruptcy of customers, as to make it appear expedient to collect the law and decisions thereon, so as to present the whole in a form and arrangement, which it is hoped may prove useful, to those who are called upon to advise with bankers, in these emergencies.

By the Bankrupt Law Consolidation Act, 12 & 13 Vict. c 106, s. 65, bankers are expressly declared to be traders liable to the bankrupt laws.

Bankruptcy of Bankers as such.—All persons, it would appear, are to be deemed bankers, who act as such, although they may not keep banking houses;(a) such are army and navy agents.

A member of a joint-stock banking copartnership, is a trader subject to the bankrupt laws, when his holding of shares is bona fide, with a view to profit;(b) but to purchase shares for the mere object of obtaining the benefit of the bankrupt laws, will be ineffectual; for the holding of

(x) Pott v. Eyton, 3 C. B. 32.

(y) Powles v. Page, 3 C. B. 16; see Jacaud v. French, 12 East, 317; and see 7 M. & Gra. 607.

(z) Ex parte Chippendale, 4 De G. M. & G. 19.

(a) Ex parte Wilson, 1 Atk. 218; see 2 Rose, 210, 211, and Cowp. 747, 750, 751.

(b) Ex parte Wyndham, 1 M. D. & De G. 146; Ex parte Hall, 3 Deac. 405; Ex parte Lewis, 1 M. D. & De G. 371.

them under such circumstances, is settled not to be a sufficient trading to support a *fiat*.(c)

A banker who has ceased to trade as such, cannot it seems, sue out a *fiat* against himself, unless he owes a debt *contracted during [315] the trading, which would support a creditor's *fiat*.(d)

With respect to what is a sufficient absenting from the banking house, to constitute an act of bankruptcy, in a case of a bank in which there were three partners, and one of the partners who resided on the spot, and was the only partner who transacted the business, the others residing at a distance, absented himself from the banking house, shut it up and stopped payment, it was held this was not evidence of a joint act of bankruptcy by all three.(e)

With respect to acts of bankruptcy arising on sales of property, the rule seems to be taken *now* to be, that a trader may sell his stock in trade or other property, without such sale being taken as an act of bankruptcy, provided the object and effect is to enable him to carry on his trade: on an emergency, he may sell *all* his property for that object; and this a bank on which there is a run may do.(f)

Where bankers go on receiving deposits and issuing notes, after they are aware that their affairs are in a state of utter, hopeless insolvency, they will be refused a certificate on their bankruptcy though the court, on the consent of the assignees and opposing creditors, may grant them protection; but whether such protection is of any avail against the common law rights of creditors, who do not come in under the bankruptcy, seems very questionable,(g) and certainly it is of no avail whatever against creditors, whose debts were not provable under the commission.(h)

Evidence of Dishonest Dealings.—It appears to be assumed, that the failure of a banker is *of itself*, evidence that he has been acting dishonestly. The customers of a banker *have a right to look to [316] him, for the exercise of cautiousness and circumspection, for undeviating adherence to the purest good faith and strictest integrity, in the use of their money, which they have lent him as a banker; they have a right to expect that he will confine his trade to its legitimate field; viz., of discounting bills and purchasing, or advancing money upon proper securities.

But, allowing a partner without giving security, greatly to overdraw his private account with the bank; especially if such partner is a managing partner; permitting unnecessary litigation, and charging the expenses to the assets of the bank; wrongful dealing by way of transfer, pledge, or any kind of conversion with a customer's short bill or other security; failure to keep a profit and loss account; are elements of consideration

(c) Ex parte Wyndham, 1 M. D. & De G. 149; Ex parte Atkinson, id. 300; and see Ex parte Brown, 2 id. 758.

(d) Ex parte Mitchell, De G. Bank. R. 257.

(e) Mills v. Bennett, 2 Rose, 269; S. C., 2 M. & Selw. 566.

(f) See per Erle, J., Bittleston v. Cooke, 25 L. J., Q. B. 289.

(g) Ex parte Rufford, 21 L. J., Bank. Cas. 32; S. C., 2 De G. M. & G. 234.

(h) Grave v. Bishop, 25 L. J., Exch. 58.

for a court of bankruptcy, on the question whether a certificate shall be granted; and if many of these circumstances concur, they will certainly refuse the certificate.⁽ⁱ⁾

Proving against Bankers in Bankruptcy.—As to questions of what parties, and in what capacities, are entitled to prove against bankers on their bankruptcy, some few points may be stated, by way of endeavouring rather to show the view which the courts have taken, with reference to the particular circumstances, than to extract any rule upon the subject.

If a father, who is one of a banking firm, from time to time transfer sums of money to the credit of a son, who has an account with the bank, and do this under circumstances, excluding the idea of contemplated bankruptcy having been the motive for his conduct, the son may prove [*317] for the amount *standing in his account to his credit, at the time of the bankruptcy of the firm.^(k)

A banker in London, has branch banks in Edinburgh, and other places; his branch bank of deposit at Edinburgh, is managed by an agent, Blyth; the banker stops payment, and the same day sends letters by post to Blyth, and his other agents, informing them of the fact, and directing them to discontinue business. Before the letter, or other notice of the bankers having stopped payment reaches Blyth, a customer pays to Blyth, three bank notes of an Edinburgh bank, for 100*l.* each, five promissory notes of another banking company, and some silver; in all 305*l.*, for the purpose of having the amount remitted to London, to be paid to the banker, to the order of the Edinburgh customer; but, after the news reaches Edinburgh, and whilst the notes are still in Blyth's possession, gives Blyth notice not to part with them, and they remain in his hands when the fiat issues against the banker. Blyth had a lien on the funds in his hands, and the assignees allowed him to retain the above sum in part satisfaction of it; but they were obliged to refund the amount to the customer.^(l)

A partner in a bank drew out part of a balance, standing to the account of trustees of a will, under which he was interested, without the authority of the trustees, and invested it upon a canal mortgage, which was an unauthorized security.^(m) On the bankruptcy of the bankers, the *cestuis que trustent* were held to be entitled to prove for the whole of the balance, without giving up the canal mortgage.⁽ⁿ⁾

A. was co-partner with B., C. and D., in a banking firm, and was partner in another banking firm, with B. and C.; then A. dies, and E. [*318] is admitted a partner in the first-mentioned *bank *only*. Each firm becomes bankrupt, and by an order of the court, the estates of the two firms are consolidated. A person who had become a creditor

(i) *Re St. Albans Bank*, 1 Fonbl. Bank. R. 84. On appeal, the refusal of certificate, in this case, was confirmed, on the ground of the misconduct, as to pledging the short bill, without going into the other parts of the case. *Ex parte Sturt*, 4 De G. & S. 49; see 2 De G. M. & G. 241.

(k) *Ex parte Skerratt*, 2 Rose, 384.

(l) *Ex parte Cunningham*, 3 M. D. & De G. 58; *Ex parte Solomons*, id. 77; *Ex parte Wylie*, id. 82; *Ex parte Belcher*, id. 87, confirming *Ex parte Cunningham*.

(m) 3 De G. M. & G. 218; See *Re Bankhead*, 2 Kny & J. 560.

(n) *Ex parte Biddulph*, 3 De G. & S. 587.

of the first-mentioned bank, in A.'s lifetime, received a dividend out of the consolidated estate; but, that was held not to have released A.'s estate.^(o)

At the time of the bankruptcy of S. & Co., bankers, in London, one Harrison had an account with them. The commission issued against the bankers on 21st December, 1825. Some time before the 5th December, 1825, one Hippius had been induced to accept, for the accommodation of Harrison, two bills of exchange, drawn by Harrison on Hippius, in favour of Harrison; one of these was dated 22nd October, 1825, payable at four months; the other dated 1st November, 1825, payable at four months; both were indorsed by Harrison, on 5th December, 1825, and on that day he discounted them, together with three other bills of exchange, making in the whole, the sum of 2,907*l.* 8*s.* 4*d.*, with S. & Co., and the amount of the whole number of bills was carried to the credit of Harrison in his account, and he was debited with the discount thereof. Between that day and the bankruptcy, Harrison drew out considerable sums by cheques. The three last-mentioned bills had been negotiated by the bankers, previously to the bankruptcy, the two others remaining in the possession of the bankers at the time of the bankruptcy, at which time, also, there was a cash balance due from them to Harrison, to the amount of 1,500*l.*; after the commission, Harrison paid the three bills above mentioned.

The assignees of S. & Co. claimed to be entitled to sue Hippius on the two bills, and to negotiate the same; but the bills were ordered to be delivered up to Harrison, in part discharge of the cash balance, with liberty to prove for the difference against the estate. The assignees, it was considered could not be allowed to proceed against Hippius, *who was in effect a surety, for the purpose of defeating [*319] the right of set-off, which Harrison, the principal would have had, if the action had been against him.^(p)

The following case may, perhaps, not unfitly, obtain a place here, in illustration of the effect of the bankruptcy of bankers upon the relations of their customers :—A. buys goods of B., and, both having accounts with the banking-house of Caldwell & Co., of Liverpool, gives him, in payment, an order on Caldwells, dated 7th February, 1793, directing them, two months after date, to give to B. a bill of exchange, at two months, for the price of the goods; which order was indorsed by B., and paid by him into Caldwells, who entered it short in B.'s account. The general course of business between Caldwells and most of their customers, was to settle accounts on certain quarterly days. When they advanced bills for the accommodation of their customers, or received bills for them, the course was, to enter the whole amount in the bank books as bills; but on the quarterly days Caldwells debited his customers with the whole amount of the bills advanced to or for them, crediting them, at the same time, for interest from such day, to the day when the bills would fall due, and they credited the customers for the whole amount of bills paid in by

(o) *Harris v. Farwell*, 13 Beav. 403.

(p) *Ex parte Hippius*, 2 Gly. & J. 93, on appeal, cor. Lord Eldon, C.

them, debiting them for interest, in like manner; and when an order, or cheque, was paid in for a bill to be drawn on a future day, they calculated, and allowed interest, on the next quarterly day, to the time when such bill, if drawn, would become payable. It appeared that the account of B. had been settled only six times, between May, 1789, and March, 1793, but that each of these settlements took place on a quarterly day. On the 18th March, 1793, Caldwells became bankrupt (after which, of course, they could not give a bill,) a quarterly day having intervened between the payment of the order into the bank and the bankruptcy, but [*320] upon this last-mentioned quarterly day, no settlement of *accounts took place between the bankers and B. The amount of the order was never carried out as cash, nor was any calculation of interest thereon ever made until after the bankruptcy. When the order was paid in, there was a balance in favour of B., on his account, of 51*l.* 11*s.*, but the account was much overdrawn before the bankruptcy, without any other addition having been made to the credit side of the account, beyond the order in question.

On these facts, the Court of Exchequer held that the order did not amount to payment, and that in an action of assumpsit, by B. against A., for goods sold and delivered, it was not competent to the defendant to prove, by the bankers' books, that, at the last-mentioned quarterly day, the account between him (A.) and Caldwells was settled, at which time he was debited with the whole amount of the order, and credited for interest thereon, from the day of the settlement, to the day when the bill, mentioned in the order, if drawn, would have become due.

Now, it was obviously material for the buyer to make out that a settlement had taken place, before the bankruptcy, between the sellers and the bank, for that would have changed a transaction, which was only a bill transaction, into a money transaction. But the order did not amount to payment, because, on the facts, the court was of opinion, that the seller of the goods had never accepted it, as payment. The evidence was not admissible, because, although similar evidence was admissible, and was admitted, to show how the account stood between the seller and Caldwells, inasmuch as it was an essential part of the transaction, and arose as much out of one side of the case as out of the other, the seller being bound to show what had become of the order given to him for the goods; yet, though the buyer and Caldwells had had a settlement, and the former had agreed to be accounted debtor, to the bank, for the amount of the order, the seller was not acquainted that he had acquired [*321] this new credit in the books of the bank; and *the bank, if called upon, in consequence of this agreement between the buyer and them, to pay the amount, to the seller, might have answered—"It is true we have admitted the buyer to be our debtor for the amount, but what use can you, a third party, make of that agreement?" The bankers, therefore, could not have been charged, by the sellers, and, therefore, the evidence, which would have been of no avail, if admitted, was properly excluded.(*q*)

Friendly Societies.—With regard to the nature of the claims of friendly societies, whose moneys have been deposited with bankers for the sake of the convenience of making payments, and of security, in case of the bankruptcy of the bankers, it has been settled that bankers, although they may have been named treasurers of a friendly society, are, nevertheless, not “officers” of the society, within the meaning of 4 & 5 Will. IV. c. 40, s. 12, so as, upon their bankruptcy, to entitle the society to payment in full of the balance due to the society; and this is so, whether the bankers had been permanently appointed treasurers,^(r) or only for an occasion.^(s)

Nor are they “employed” as officers, when there is no formal appointment of treasurer, but all that occurs is merely that the moneys of the society, (except what is wanted for current expenses,) are paid into the bank.^(t)

Fraudulent Preference.—The following transaction has been looked upon as doubtful, whether it amounted to a fraudulent preference, or not.

An army agent is in the habit of advancing money to his customers, on their pay and pensions; this he does by cheques on his bankers. He overdraws his account with *his bankers, and agrees, in consideration of new credit, to pay over to them, as he receives them, [*322] the funds that come to his hands half-yearly from government, for the discharge of pensions: this arrangement is not known to the authorities who issue these moneys. The army agent then, unknown to his bankers, commits an act of bankruptcy, and, having subsequently received some government moneys, pays them over, in pursuance of the arrangement, being indebted to the bankers in more than the sum paid over; and though it was admitted, on all sides, that if the sums were put into the bank merely to enable the bankrupt to go on, in business, for a time, they were not payments in fraud of creditors: yet it was not denied that the jury might, on the above facts, and the course of dealing, after the new credit, have inferred a previous contract or engagement; but a payment made, after an act of bankruptcy, in compliance with a previous binding contract, is not a fraudulent preference of the creditor paid.^(u)

But when a country bank, being in failing circumstances, and having suspended payment, and who, a few days afterwards, became bankrupt, handed over to a partner of a London banking house, their correspondents, certain cash, bills, and notes, part of them in the expectation that assistance would be given them, and part without such expectation, but without any intention of undue preference, and without any contemplation of bankruptcy, at the time; both were held to be recoverable, by the assignees, as money had and received to their use,^(x) part as being a

(r) Ex parte Harris, De G. R. 162.

(s) Ex parte Whipham, 3 M. D. & De G. 564.

(t) Ex parte Orford, De G. & Mac. Bank. R. 83.

(u) Vacher v. Cocks, 1 B. & Ad. 145.

(x) Simpson v. Sikes, 6 M. & Selw. 295; see Gibson v. Muskett, 4 M. & Gra. 160; Gibson v. Bruce, 5 id. 199.

fraudulent preference, and part as being delivered in the hope of receiving assistance, which had never been rendered.

Powers of Assignees.—A. being tenant for life, without impeachment [*323] of waste, with remainder to B. for life, without *impeachment of waste, remainder over, carried on business as a banker, in partnership with B. and others; and the firm having become bankrupt, the assignees cut down ornamental timber.

The court held them not to be entitled to the income arising from the proceeds of the timber wrongfully cut down, either during the life of A. or the life of B., but that such proceeds, together with the accumulated income thereof, belonged to the first tenant in tail.(y)

Bankruptcy of Customers.—Bankers have been shown to be liable at the suit of a customer, if they fail to comply with his orders; *ex. gra.*, if they fail to apply moneys paid to them for the purpose, to the payment of bills accepted by him, and made payable at their bank. So, if the customer becomes bankrupt before commencing the action, his assignees may sue the bankers and recover damages, and the sum which they recover they may retain against the holders of the bills, who will be reduced to prove against the estate, for the amounts of the bills.(z)

There is, sometimes, considerable difficulty in questions as to dealings between bankers and customers *on the verge of bankruptcy*.

If bankers receive and pay money on account of a bankrupt, after notice of his bankruptcy, they cannot set-off the payments against the receipts; for as every man is bound to know the law, they must be taken to have known—that a bankrupt is not a free agent, and has no longer the disposition of his property: that they were not bound to honour his cheques in favour of creditors; that by so doing they were doing an illegal act, and were assisting in committing a fraud on the rest of the the bankrupt's creditors, who were not the payees of the cheques; the spirit and intention of the bankrupt laws being an equal distribution of the effects of *the bankrupt among all his creditors. Therefore, [*324] the assignees will be entitled to recover from the bankers, the whole of the sums received by them, on account of the bankrupt after the bankruptcy, without any deduction for the payments to whatever amount made to his orders; which being made illegally, and besides in their own wrong, fall as a loss upon the bankers.(a)

It was also attempted on behalf of the bankers in this case, to obtain the benefit of an assignment, a deed, for which purpose instructions had been given by the bankers to their attorney to prepare, and which purported to convey to them, two ships of the bankrupt then at sea, together with their freight, and an exchequer tally; but as it appeared that, although the instructions had been given before the bankruptcy, the deed had not been executed, by the bankrupt until after the bankruptcy, the bankers could have no advantage of the assignment.(a)

(y) *Lushington v. Boldero*, 21 L. J., Chanc. 49; S. C., 16 Jur. 140.

(z) *Ex parte Sparkes*, 1 Fonb. R. 51.

(a) *Vernon v. Hankey*, 2 T. R. 113; S. C., 3 Bro. C. C. 313; see *Raphael v. Birdwood*, 5 Price, 593. What acts are acts of bankruptcy, see 1 Welsby, Stats. 214, 216, 217, 219, 220, 221, 222, and 2 id. 587. Closing doors of bank is one. Cum-

It was further attempted to make out on the part of the bankers, after the trial and verdict, that, as a bill of sale of one of the ships, and the exchequer tally, had been deposited by the bankrupt with them, for some time previous to the bankruptcy, as "security for money overdrawn, or to be overdrawn," by the bankrupt, and that, upon the faith of these deposits, the bankers had afterwards advanced large sums of money, but had given up both the bill of sale and the tally, upon the assignment being executed, when the assignment was declared void, their lien upon these securities revived; but the court negatived this claim also, but only on the ground that this matter, which was brought *before the court, for the first time on a motion for a new trial, and by way [*325] of affidavit, had not been proved at the trial. If that had been done, it may be gathered from what fell from the court, that the bankers would have been allowed in respect of this lien, to deduct the values of the ship and exchequer tally, from the sums paid in since the bankruptcy, and would only have been liable to the assignees for the difference, if it had been clearly made out *at the trial*, that the deposits were made originally to secure money *antecedently* due.

But although bankers, like all other subjects, are bound to know the law, as well statute as common law; and, although, if they understand the fact out of which the law arises, or to which it applies, that is sufficient to establish their responsibility, and they are bound by the consequences; yet, it does not necessarily follow, that a banker should understand the situation of those that employ him, and if he has no notice of their insolvency, he will be protected in the payments he makes to them. (b)

As regards the cases in which bankers are entitled to prove in bankruptcy, against bankrupts with whom they have had dealings, it may be observed, of the greater part of the decisions which are extant, that they are deserving of great attention; the rest do not present such peculiarities as would warrant notice here; as these rest on the general principles which are applicable to *all* cases of bankruptcy, the points they involve must be looked for, in works professing to treat the whole subject of bankruptcy.

A customer pays in bills of exchange to his bankers, and becomes a bankrupt. The bankers prove in the first place, for the whole balance due to them from him, and afterwards some of the bills are paid them in full, by other parties *liable on them; some before and some [*326] after, the dividend is declared. In these circumstances, the proof will be reduced by the amount of the paid bills; the dividends must be refunded, so far as they relate to those bills. (c)

ming v. Bailey, 6 Bing. 363; Mills v. Bennett, 2 Mau. & S. 556. Notice to accredited agent of a corporation or public company, of an act of bankruptcy, is notice to the corporation or company. 12 & 13 Vict. c. 106, s. 87. The public officer is to make the docket affidavit where a corporation is the petitioning creditor. Ex parte Collins, De G. Bank. R. 381.

(b) 2 T. R. 121, 122; 12 & 13 Vict. c. 106, s. 165; see 2 Cox, Ch. Cas. 12. N.B. —The mistake made in relying on the assignment, at the trial, and not on the lien, was attributable, as appears, (2 T. R. 124,) to the bankers themselves, and not to their counsel.

(c) Ex parte Hornby, De G. Bank. R. 69.

Where there is more than one assignee of a bankrupt, and an account is opened, on behalf of the estate, with a banker in their joint names, it must be remembered, that not being the account of partners in trade, the banker is not discharged by payment to one of the assignees, without the authority of the rest; and, therefore, that—every banker as before stated, being bound to know the handwriting, and what is not the handwriting, of his customers—a payment made to a cheque, really signed by one, but bearing a forged signature of the other assignee will not be valid; in other words the money must be paid over again.^(d)

Money due for calls on shares in a joint-stock banking company, is not such an ascertained debt, as entitles the company to prove against a bankrupt shareholder, without first taking the accounts.^(e)

If a bankrupt after an act of bankruptcy, of which his bankers had notice, though not the act of bankruptcy on which the fiat was founded, draw upon them cheques in favour of creditors, which are paid by the bankers, they will not be admitted to prove for the amounts of them.^(f)

So, if bankers, with a knowledge of an act of bankruptcy of a customer, take a guarantee from a surety for him, to secure to a given amount, *all sums then, or thereafter to become due* from the customer, and the surety having had no notice of the act of bankruptcy, afterwards pay the bankers the full sum for which he was guarantee, without specifying to which portion of the bankers' debt the payment ^{*was to} be applied: the payment will be appropriated in reduction of that portion of the bankers' debt, which was provable under the fiat, and not of that which was not provable.^(g)

A holder of an unpaid cheque, it has been thought,^(h) has, as assignee of a chose in action, an equitable claim on the banker on whom it is drawn, and may prove for the amount of it upon his bankruptcy.

A customer at the time of his bankruptcy, is indebted largely to his bankers; they are made bankers to his assignees; they then become bankrupts; their assignees cannot draw a dividend under the customer's bankruptcy, until they have accounted for the whole, which the bankers have received as bankers, to the assignees.⁽ⁱ⁾

A customer of a banking house had a large sum in their hands. Under the old law of bankruptcy a commission issued against him, but was not proceeded with, though it still remained in force: the bankers in this state of things refused to honour the customer's cheques. The customer sues them; and they file a bill stating the circumstances and praying an injunction to restrain the proceedings at law, upon their payment of the whole sum in their hands, into court.

It will be observed, that here being no assignees appointed, there was no one against whom a bill of interpleader could have been filed.

(d) *Innes v. Stephenson*, 1 M. & Rob. 145; see 2 L. M. & P. 50; 10 C. B. 640; *Stewart v. Lee*, M. & M. 158.

(e) *Ex parte Snape*, Mont. & C. Rep. 607; S. C., 4 Deac. 164.

(f) *Ex parte Sharpe*, 3 M. D. & De G. 490; see 2 Rose, 71; *Bamford v. Burrell*, 2 B. & P. 1; 12 & 13 Viet. c. 106, s. 165.

(g) *Ex parte Sharpe*, 3 M. D. & De G. 490.

(h) See *Byles on Bills*, 17, 6th edit. qu. tam.

(i) *Ex parte Bobb*, 19 Ves. 222; *Ex parte Graham*, 3 Ves. & B. 130.

The court held, that there was no ground for interference with the proceedings at law, notwithstanding the existence of the commission.^(k)

The long-settled practice establishes, that a country banker, whose usage it is to discount bills, charging 5*l.* per cent. interest, and commission at the rate of 2*s.* 6*d.* per cent. per month, for the time the bills had to run, may prove in *bankruptcy, for the amount of the bills, [*328] *together* with interest and commission.^(l) And where the bankers carried on business at Faversham, and discounted bills for the bankrupt, before the bankruptcy, which bills were drawn by him upon and accepted by persons resident in London, so that there was nothing to be done, except merely writing to the bankers, their correspondents in London, where, and through whom the money on the bills was paid;—that was held by Lord Eldon to be a case with the rule.^(m)

On the other hand, in case of the bankruptcy of the bankers, their assignees are entitled to recover in like manner from the customer, or for the interest on the balance against the customer, both for the time that it has been against him, previously to the bankruptcy, and for the time since elapsed.⁽ⁿ⁾ The bankruptcy did not make it less the duty, and it made it more the interest of the customer to discharge the debt, and he must make an equivalent for not having done so.

A. was indebted to a bank in 20,000*l.*, on the balance of his account. The firm agreed, that if A., and another party, B., would give a bond for paying 10,000*l.*, by yearly instalments of 1,000*l.*, paying interest on any instalment which might be in arrear, the debt should be considered as reduced to 10,000*l.*, and cancelled. The bond was given. Before the first instalment became due, both the firm and A., became bankrupt, when the assignees of the firm claimed to prove against A.'s estate, for the whole 20,000*l.* and interest. The proof, however, on the ground that an additional debtor had been introduced, by the agreement, and that as the bond contemplated the falling into arrear of the instalments, and as none of the particulars of the agreement *had been reduced into writing, the old debt must be considered to have been intended [*329] to be satisfied by the bond.^(o)

A firm of B. & Co., shipowners in the country, had dealings with K. & Co., bankers in London; the course of dealing being, that B. & Co. drew bills on K. & Co., which K. & Co. accepted, for the accommodation of B. & Co., who, in order to provide for the payment of these bills, remitted to K. & Co., cash, and deposited with them bills payable to themselves (B. & C.); the amount of these bills was received by K. & Co., and placed to the credit of B. & Co.'s cash account. Both firms became bankrupt in 1812; K. & Co., in July, B. & Co. in August; there being at the latter date, a large balance owing by B. & Co., to K. & Co., on their account; K. & Co. being also liable to a large amount, on the

(k) Fuller v. Gibson, 2 Cox, Ch. 24.

(l) Benson v. Parry, cited 2 T. R. 52; Winch v. Fenn, 2 T. R. 52, n.; see Auriol v. Thomas, 2 T. R. 52; Hammett v. Yea, 1 B. & P. 144; see 3 B. & P. 161.

(m) Ex parte Jones, 17 Ves. 332; see Baynes v. Fry, 15 Ves. 120.

(n) Pott v. Beavan, 7 M. & Gra. 604.

(o) Ex parte Hernaman, 12 Jur. 643; S. C., 17 L. J., Bank. 17.

accommodation bills accepted by them for B. & Co., and having in their hands, bills also to a large amount, deposited with them by B. & Co., to provide for the payment of such acceptances. Before any dividend was declared on the estate of K. & Co., their assignees realized from the deposited bills, more than sufficient to liquidate the cash balance due from B. & Co. The holders of the accommodation bills proved against both estates, and were fully paid, receiving ten shillings in the pound from each estate. The sum thus paid, by the estate of K. & Co., exceeded, by above 6,000*l.* the whole sum realized from the deposited bills. No debt was proved, nor attempted to be proved, on behalf of the estate of K. & Co., against the estate of B. & Co., until 1847, when a further portion of the outstanding estate of B. & Co. was realized, but to an amount insufficient to pay twenty shillings, in the pound, to their creditors, exclusively of K. & Co.

On a claim made on behalf of the estate of K. & Co., the assignees were held to be entitled to prove the cash balance due by B. & Co., and also the 6,000*l.*, and that in respect of the 6,000*l.*, and until thereby [*330] that sum was repaid, they *were entitled to the benefit of the proofs made against the estate of B. & Co., by the holders of the accommodation bills.(*p*)

In the same case, a principle was recognized, as of general application, which it may often be very material, to their interests, for bankers who hold securities to be aware of; namely, a creditor holding a security, is entitled to apply it in discharge of whatever liability of the bankrupt debtor he may think fit.(*p*)

Short Bills, &c., deposited.—Enough has been stated, under another division of the subject, to show fully under what circumstances, goods, &c., in the order and disposition of bankers pass to their assignees, on the event of their becoming bankrupt, and that among these are not short bills, or any securities deposited with them for the purpose of obtaining payment of them, as agents of the customer, or for other specific purposes, and not as money.(*q*)

On the other hand, bills discounted are among the things which pass to the assignees.

So, if bills be indorsed to a banker in the country, in exchange for his bill upon his correspondent in London, the property passes, although the latter bill be dishonoured, and trover will not lie for them, against the banker's assignees.(*r*)

Here we may stop to observe, upon the absolute necessity of keeping the books of bankers correctly; the entries in them are obviously of the greatest importance to the interests of the customers; because it must be from the books that the clerks of the bank, and others, are to find whether the cheque of a customer is to be honoured, or not, and because [*331] it has been decided to be proper to receive in evidence, *a banker's ledger, to show that a customer had no assets on a

(*p*) *Ex parte Johnson*, 3 De G. M. & G. 218.

(*q*) See *Shelford, Bank*. 150; *Zineck v. Walker*, 2 W. Bla. 1154.

(*r*) *Parke v. Eliason*, 1 East, 544; *Hornblower v. Proud*, 2 B. & A. 327; see 1 Rose. 153.

given day, in the banker's hands, the question arising in an action, to which neither the customer nor the bankers were parties. In the same case, it was thrown out that the books might not be evidence, to show affirmatively, that the customer *had* money in the bankers' hands.^(s)

If a trader, after an act of bankruptcy, draws a bill of exchange upon his bankers, which they accept for a sum, for which in part they hold effects, but for the residue, accept for the customer's accommodation, a party suing the bankers on the bill, can only recover for so much of the bill as had been accepted for the accommodation of the trader; for the rest, the bankers will be liable, at the suit of the assignees.^(t)

So, if bankers accept a bill, for the accommodation of a trader, for the payment of which he, after an act of bankruptcy, but before fiat, lodges money with them, and the bill when due, (which is after the fiat,) is paid by the bankers, they must refund to the assignees.^(u)

A customer of a bank, who had been used to *deposit* with them bills of exchange, and promissory notes, as security for advances, having got four bills accepted by A., for his accommodation, *deposits* them, with the bank, to secure his floating balance; he then becomes bankrupt, when the bankers prove for a balance greatly exceeding the amount of the bills, *excepting them with others*, in their proof, *as securities*. They afterwards receive a dividend of two shillings in the pound, on the amount of their proof.

The bills were paid in full, to the bankers, by A., and he was held to have a title (as a surety entitled to stand in place of the creditor proving,) to call upon the bankers *to refund the amount of the dividend [*332] of two shillings, on the amount of the bills;^(x) for such a dividend cannot be treated as a payment generally, on account of the whole debt, but must be considered as a payment of part of each pound of the debt.

A customer indorses, and pays into a bank, in usual course of dealings, certain bills of exchange: these, in conformity with the usual practice of the bank, as regarded this customer's bills, are carried to the credit of the customer, and cheques are drawn by the customer, and payments made, from time to time; on the bills arriving at maturity, the customer is debited with the amount of those that were dishonoured. The balance of the account is struck every half year; the customer becomes bankrupt; the bankers prove for the whole balance due; afterwards, some of the bills are paid in full, by other parties liable, some before, and some after, the dividend is declared. This renders it necessary to reduce the proof by so much, and refund the dividends to that extent.^(y)

A., B., C. and D. were four partners constituting a banking firm.

A customer, under an agreement with them, pays in bills of exchange,

^(s) *Furness v. Cope*, 5 Bing. 114; and see *Brown v. Kewley*, 2 B. & P. 518.

^(t) *Willis v. Freeman*, 12 East, 656.

^(u) *Tamplin v. Diggins*, 2 Camp. 312; see *Vernon v. Hall*, 2 T. R. 248; *Pinkerton v. Marshall*, 2 H. Bla. 334.

^(x) *Ex parte Holmes*, per Lord Cottenham, C., 4 Deac. 82; see *Bardwell v. Lydall*, 7 Bing. 489.

^(y) *Ex parte Hornby*, De G. Bank. R. 69.

indorsing them, it being the arrangement that he should take out instead, their promissory notes, they allowing him twenty-four days' interest on each bill paid in. On 22nd July, separate commissions of bankrupt issue against three of the bankers, B., C. and D. On the 23rd July, the customer receives, from the bank, notes to the amount of 100*l.*; next day, he pays in two indorsed bills for 75*l.* and 70*l.* respectively, due on the 17th of August. On 4th August, a commission issues against A. On 12th August, the former commissions are superseded, for a joint commission against the firm.

[*333] *Under these circumstances, it was held, that the assignees were not entitled to retain the bills, (z) on the ground that the relation of debtor and creditor never subsisted prior to the bankruptcy, and that the consideration had failed, on which alone the bills were parted with.

Where bankers proved against a customer for their whole debt, as shown on the drawing account between him and the bank, and exhibited bills, deposited with them by him, as securities, and then received the amount of some of the bills so deposited; the proof was ordered to be expunged, the bills remaining unpaid were ordered to be sold, and a new proof to be made, deducting all that was received, on account of the bills, considering them as mere pledges. (a)

Mutual Credit and Set-off.—With respect to questions of mutual credit and set-off, in bankruptcy, it will be desirable to state the points, which most frequently arise, in the business of bankers. The following case forms an useful illustration of the principles governing these questions :—

A trader having obtained large advances, from the Bank of Bengal, deposited company's paper with them, as collateral security, with leave to them to sell, in default of his repayment of the loan, by a given day, paying over the surplus, if any, to him.

Before default in the repayment of the loan, he was declared insolvent, under the Indian Insolvent Act, which declares that when there has been mutual credit by the insolvent, and any other person, one debt or demand may be set off against the other, and that all debts, provable in England, shall be provable in India, &c. In fact, the enactments are precisely similar to the part of the English Bankrupt Act, which regulates this subject.

At the time of the insolvency, the bank also were holders, as indorsees, [*334] of two promissory notes, made by the trader, *which the bank had discounted for him, before the making of the loan, and deposit of the company's paper.

The time of repayment of the loan having elapsed, the bank sold the company's paper, the proceeds of which, after defraying principal and interest, produced a considerable surplus.

The assignees of the trader brought an action to recover this surplus, when it was held that the bank had no right to set off the amount of the two promissory notes; this not being a case of *mutual credit*, such as is

(z) Ex parte McGae, 2 Rose, 376.

(a) Ex parte Balwin, cited 19 Ves. 230.

meant by the Bankrupt Acts; because, although it has often been said to be the law, that where the one debt is immediately due, and the other only due at a future day, there is a mutual credit; *(b)* yet, in all of the cases which have so decided, it was certain that the party receiving the credit must, sooner or later, become debtor *in presenti*; that a power was given, over funds, which the party giving could not revoke; then also the debt, in order to be set off, must be provable, but the trader could not have proved for a contingent surplus. *(c)*

The case would have been altogether different, if the bankers had sold the paper, and received the surplus, prior to the bankruptcy, then they would have been debtors to the trader, and so within the statute.

It is a well-known rule, that whoever takes a bill must be considered as giving credit to the acceptor; and whoever takes a note, credit to the drawer. But what more particularly belongs to the subject of this treatise, is to call attention to a qualification which has been engrafted on the rule, involving matter of interest to bankers. That qualification is this, that the holder of a bill, or note, in order to be entitled to the benefit, or to be within the enactments respecting *mutual credit, and set-off, must not be a mere agent, holding the instrument [*335] for the benefit of other parties. The following instance may be useful, as an illustration of the proposition:—Maberly's assignees sued L. & Co., as acceptors of a bill for 1,000*l.*, drawn by the Commercial Bank, and indorsed to Maberly. At the time of Maberly's bankruptcy, L. & Co. had, in their hands, a bill for 700*l.*, drawn by a firm, in which Maberly was a partner, accepted by a firm, in which he was also a partner, and indorsed by the Commercial Bank. This bill became due on the day on which Maberly stopped payment, on which L. & Co. protested it, and having in their hands sufficient assets of the Commercial Bank to discharge it, debited the company with the amount, and sent them the protested bill, with the receipt for it. The Commercial Bank sent back the bill, requesting L. & Co. to set off its amount against their own acceptance for 1,000*l.*; and the question was, whether they had the right to do so. The decision was, they had not; for that L. & Co. were not creditors of Maberly, but held the bill for 700*l.* as agents, or mere trustees, for a foreign house, and as such, had no right to set it off, against a demand made on themselves, in their own right. *(d)* The rule is established, to insist upon demands, in respect of which, set-off is claimed, being shown to be *in the same right*, *(e)* in cases of solvent parties; but in cases under the bankruptcy laws, the principle adopted is not quite the same. *(f)*

It follows, from the authorities lately cited, that there is no mutual credit when securities have been deposited for a particular purpose with

(b) Ex parte Prescott, 1 Atk. 230; Smith v. Hodson, 4 T. R. 211; Rose v. Hart, 8 Taunt. 499.

(c) Young v. Bank of Bengal, 1 Deac. 680, 681, H. Lds.; see 12 M. & W. 751.

(d) Belcher v. Lloyd, 10 Bing. 316; see Foster v. Wilson, 12 M. & W. 191; Fair v. M'iver, 16 East, 130; Pollard v. Ogden, 2 E. & B. 459.

(e) Gale v. Luttrell, 1 Y. & J. 180; Baillie v. Edwards, 2 H. Lds. 74, is not an exception to the principle.

(f) See per cur. Forster v. Wilson, 12 M. & W. 203.

a bank, by a customer whose account is overdrawn, or to whom the bankers have lent money. *(g)*

[*336] **Set-off*.—A trading firm was indebted to a country banking copartnership, consisting of three partners, called the Tweed bank, on the balance of their banking account, when the bank stopped payment. On that day and the day following the firm received from customers, certain 5*l.* notes of the bank in part payment of *antecedent* debts, on condition that they were to debit themselves with so much only, on account of these notes, as they should receive from the assignees in respect of the notes. These notes were received by the firm, without notice of any act of bankruptcy by the bankers, and before any docket had been struck. They also received, during the same day on which the bank stopped payment, certain other of the bank notes, from persons not debtors to them, for which they were *to pay*, only so much as they should receive from the assignees in respect of them.

In an action brought by the assignees to recover the amount of the balance against the firm, on their account with the bank, it was decided that the firm had a beneficial interest in the notes of the first class, and were, therefore, entitled to set them off against the claim of the assignees; but that, as to the second class, they held these merely as trustees for others, and were not entitled to set them off. It was not disputed that notes which they held as having received them before the bank stopped payment, in bona fide payment of antecedent debts, and for goods sold, might be set off, without notice of any act of bankruptcy. *(h)*

The law, it may be observed, is undoubted, that a holder of country bank notes has a right to set off, in an action by the assignees of the bankrupt bankers against him, bank notes, taken by him after the bank has stopped payment; provided, at that time he has not notice of an act of bankruptcy, and that, notwithstanding that he took them for the very purpose of making them the subject of set off, and in substance, of getting 20*s.* in the pound upon them. *(i)*

[*337] *A customer's account with his bankers, showed a balance in his favour on the day on which he became bankrupt. Previously to that the bankers had discounted for the customer bills for a large amount, which were indorsed in blank by the customer, and two of them were paid by the acceptor before the bankruptcy; the others, much exceeding the amount of the customer's balance, did not become due before the 16th of November, the bankruptcy having taken place in the previous October. 2nd November the assignee commenced an action against the bankers for the balance; 8th November the bankers proved against the bankrupt's estate, for the whole of the bills, excepting the two which had been paid, and deducting the amount due to the bankrupt on the balance of his account, on which credit had been given to him for the amount of the bills discounted, and he had been debited with the amount of the discounts.

(g) See per Parke, B., *Alsager v. Currie*, 12 M. & W. 751, explaining *Young v. Bank of Bengal*.

(h) *Foster v. Wilson*, 12 M. & W. 191.

(i) *Hawkins v. Whitten*, 10 B. & C. 217.

The transaction, as regards the bills, being considered to amount to a loan of money, and not a purchase of the bills, the bankers were held to be entitled, as indorsees, to set off in the action the amount of the bills not due.

Even if a purchase of the bills had been made, it might either have been proved against the estate, or made the subject of set-off in an action.^(k) For a bill is provable against the estate of the drawer before dishonour by the acceptor, and if provable, then by the terms of the statute it is a debt, and may be set off.^(l)

The following is a case of set-off, *not* in bankruptcy.

Where the practice of a bank was to accommodate a customer, A., with a loan of 1,000*l.*, upon the security of his promissory note, which was renewed every three months, the bankers, upon these occasions, discounting the note, by placing the amount of it to the credit of A., as cash paid in by him, and debiting him, on the other side of his account, with the discount; each of these was considered *not as one continuous loan, but as separate transactions: and, therefore, the [*338] bankers having, on the last transaction, (the note having fifty-three days to run at the time of the death,) entered it to the debit of A.'s account, allowing rebate of discount for the time it had to run, it was considered they could not set off the 1,000*l.* against the executor's claim, before the fifty-three days were out, for the balance of A.'s account.^(m)

A question of very considerable importance, under this head, is, what is the character of a deposit of money made by a customer with his bankers, to meet a bill which he has accepted, payable there; is it a debt within the statutes of set-off, or in case the customer's balance on his account is adverse, is there a mutual credit within the Bankrupt Act? Now, it seems, in accordance with the principles that have been laid down previously, and with reason, that when a customer deposits a sum of money for a specific purpose, and the banker receives it for that purpose, he should not afterwards be entitled to turn round and claim to set off the sum against money due to him from the customer; and so it has been decided, in an action of special assumpsit, &c.: and the customer or his assignees upon his bankruptcy, may have an action, if damage has resulted to the customer, from the bankers' disobedience to his orders, in not applying the money deposited in payment of the bill; and, in such action, being for unliquidated damages, no set-off is pleadable in answer,⁽ⁿ⁾ and the sum recoverable is the whole amount of the bill,^(o) or, of the money placed in the bankers' hands, and misapplied.

The customer, or his assignees, it must be remembered, might, if they had chosen, have treated the money, when the bankers misapplied it, as a debt, and sued for it in *indebitatus assumpsit*, which would have enabled the bankers *to have had the benefit of the set-off, but only [*339] in consequence of the form of the action, not upon the merits.^(p)

Insolvency.—It is material for bankers, who have to do with cases of

(k) *Alsager v. Currie*, 12 M. & W. 751.

(l) *Starey v. Barnes*, 7 East, 435.

(m) *Rogerson v. Ladbroke*, 1 Bing. 93.

(n) *Bell v. Carey*, 8 C. B. 887.

(o) *Hill v. Smith*, 12 M. & W. 618.

(p) See per cur. 12 M. & W. 618.

insolvency, to be advised, that a slight misdescription, of their place of business, made in the schedule, and notice of the day of hearing the petition of the insolvent, if the notice has been actually served, at their place of business, will not enable them to dispute the insolvent's discharge, after it has been ordered, although, by 1 & 2 Vict. c. 110, s. 69, the insolvent is bound to deliver a schedule, containing a full and true description of his debts, and of all and every person to whom he was indebted, and although the bankers never, in fact, got the notice.(q)

[*340]

*CHAPTER XII.

THE RELATIONS OF SOCIETIES, ETC., AND OF PERSONS FILLING REPRESENTATIVE CHARACTERS, TO BANKERS GENERALLY, AND TO THE BANK OF ENGLAND.

QUESTIONS occasionally arise on the connection, in pecuniary matters, between bankers and Friendly, and other societies, charities and public bodies, and also between bankers and trustees, executors, directors, &c., which are, perhaps, not always readily capable of solution, by reference to the principles which have been shown to apply, where the question is between a bank and a customer, with whom they deal in his individual capacity. It has, therefore, been considered to be desirable to place together, for facility of reference, some leading decisions as to these matters, especially as regards transfers of stock, shares, dividends, &c.

Treasurers of Societies, &c.—The members of banks, individually or collectively, frequently undertake the duties of treasurers to societies, trustees, commissioners, and other public bodies, and several decisions have been made pointing out their rights and liabilities in such cases, as well as where public bodies are mere customers; which it is necessary to state, for their guidance, in assuming these offices, and in dealing with such bodies.

The first case we shall mention, is one rather bearing on this subject, than one in which the bankers were regularly made the treasurers of the public body.

Where an Enellosure Act empowered certain commissioners to make a rate to defray the expenses of passing and executing the act, and enacted that persons advancing money to them, should be repaid out of the first [*341] money raised; and *expenses were incurred in execution of the act, before any rate was made, the commissioners, to defray these expenses, drew drafts on their bankers, requiring them to pay the sums therein mentioned, on account of the public drainage, and to place the same to their account *as* commissioners. The bankers, for six years, continued to advance considerable sums, by paying these drafts.

(q) Brown, Janson and others v. Thompson, 25 L. J., C. B. 55.

Here it was held, that the commissioners were personally responsible, to the bankers, for the amounts drawn for.^(a) It was held also, on its being shown to be a general practice with the bankers to make half-yearly rests, in the accounts of their customers, and to charge interest upon the balances then struck, and that they had done so in their accounts with the commissioners, who had assented to such mode of keeping the accounts, that the bankers were entitled to interest, reckoned in this mode, upon the several sums advanced by them.^(a)

Some paying commissioners make a banker their treasurer, without any written appointment. Their private act gave them power to sue, by their clerk, for any debt due, from any treasurer, or other person *appointed* by the commissioners to receive money, or his assignees, in case of his becoming bankrupt, with money of the commissioners in his hands, and that his assignees should pay such debt in full, in preference to all other, except crown debts. Here it was held, as might have been expected, that the commissioners might sue by their clerk, the assignees, and recover the amount of their money in the banker's hands, at the time of the bankruptcy of the banker; and also that the assignees were liable, as standing in the place of the banker, for the whole of the produce of certain Exchequer Bills, which the banker had received, from the commissioners, *and afterwards sold, without having paid [*342] over the produce, before becoming bankrupt.^(b)

When one of the partners in the banking house of Sir Claude Scott, was treasurer of the Marylebone and Finchley Roads Trust, and advanced to the chairman of the trustees, who applied to him for such advance, by way of temporary loan, for the purposes of the trust, a sum of 2,000*l.*, which the partner placed to the credit of the trustees, it was held, that the money not having been borrowed on the credit of the tolls, as prescribed by the private acts relating to the trust, the chairman was personally liable.^(c)

The Commissioners under an act of Parliament for lighting and paving the city of Carlisle, were authorized, by writing under their hands and seals, to elect and appoint a treasurer.

John Forster, one of the members of a banking house in that city, was nominated treasurer, by an order of the commissioners, entered in their book of proceedings, and signed by the chairman; but the appointment was not made by any writing under the hands and seals, &c., as required by the act, nor was Forster ever required to give any security under the act, for the due execution of the office of treasurer. He continued, however, up to the time of the bankruptcy of the house to act as treasurer, that is to say, that the collector of the commissioners pays all sums received into the banking house, but the cheques of the commissioners purport to be drawn on Forster, individually as treasurer: they are not however, presented to him, or paid by him, but by the banking house.

(a) *Eaton v. Bell*, 5 B. & Ad. 34. The form of the cheque adopted seems to have been defective, in not mentioning the place where drawn; see *S. C.* *Eaton v. Bell* followed *Horsley v. Bell*, *Ambl.* 771; *S. C.*, 1 Bro. C. C. 101, n.

(b) *Frost v. Bolland*, 8 Dowl. & R. 384; *Dougan v. Bolland*, 5 B. & C. 622.

(c) *Parrott v. Eyre*, 3 Moo. & Sc. 857; *S. C.*, 10 Bing. 283.

Under these circumstances, the commissioners were not allowed to prove, for the moneys which they had in the hands of the bankers, at the time of the bankruptcy against the separate estate of Forster, but only to come in as creditors, against the joint estate of the firm.(d)

[*343] *In dealing with joint stock trading companies, it is material for bankers before they make advances, to ascertain whether the *directors* who represent the company, by the constitution of the particular company, have power to borrow money; if they have not, such advances will not, generally, be recoverable from the company, as a debt.(e)

Commissioners were appointed by act of parliament, for improving, &c., the harbour and the navigation of a river, running into the harbour; they were empowered to levy rates and duties on vessels entering the harbour, and also tolls on vessels navigating the river. A. and B. carried on business in partnership as bankers, and A. being appointed treasurer to the commissioners, the moneys arising as above, were paid to him, and were by him, from time to time deposited in the banking house; the account of sums received in respect of the harbour, was kept separate by desire of the commissioners, from the account of sums received in respect of the river, and the cheques of the commissioners were headed accordingly, as the money was required for the one purpose or the other. A. afterwards died, and no person being appointed treasurer in his stead, and B. carrying on the business alone, the moneys of the commissioners were paid in as before; and on the bankruptcy of B., it was held that a debt due from him, on one of the accounts might be set off, against a debt due to him on the other.(f)

Friendly Societies.—By the rules of a friendly society, which had been duly allowed, certified, confirmed, and enrolled under the Friendly Societies Acts, it was provided that there should be appointed a treasurer or treasurers, in whose hands should be deposited all the cash belonging to the society, until the same can be placed out on interest, upon [*344] *satisfactory security; and that, as soon as a sufficient sum should be collected, it should after leaving, in the club-box a sufficient sum to pay the sick, and other expenses of the society, be deposited in the hands of the treasurer or treasurers of the society, and that the clerk and two stewards should take the same to the bank, &c.

By the present Bankrupt Act, 12 & 13 Vict. c. 106, s. 167, it is enacted, that if any person already appointed or employed, or who may be hereafter appointed to, or employed in any office in any society, established under any of the acts relating to friendly societies, and being entrusted with the keeping of the accounts, &c., shall become bankrupt, the court shall on application of the society, &c., order payment and delivery over, to be made to the society, &c., of all moneys and other things belonging to the society, and also payment of all moneys remain-

(d) Ex parte Dobinson, 2 M. D. & De G. 341.

(e) Ex parte Chippendale, 4 De G. M. & G. 19; *Burmester v. Norris*, 6 Exch. 796.

(f) Ex parte Pearce, 2 M. D. & De G. 142.

ing due, which the bankrupt received by virtue of his said office or employment, before any other of his debts are paid and satisfied.

Money belonging to a friendly society had been lodged in the hands of certain bankers, who afterwards became bankrupt, with a sum of 132*l.* 0*s.* 11*d.*, of the society's moneys in their hands, and this money they were alleged to hold, not as bankers of the society, in the ordinary way of their banking business, but wholly as treasurers of the society. It was not alleged that the bankers had been appointed to be treasurers, or officers of the society, but only that they were employed in the office as treasurers of, and in the society.

The commissioner having refused to make an order, for payment in full, of the above sum, the lords justices dismissed with costs, an appeal from his decision, considering the bankrupts not to have been employed in any office, within the provisions of the Bankrupt Act.(*g*)

**Savings' Banks*.—With respect to the liabilities of bankers, as treasurers of savings' banks, the following instance may be [*345] useful.

A. was appointed treasurer of a savings' bank, being at that time, a partner in a banking house. The only account between the institution and the banking house, stood in the names of the trustees of the savings' bank, who drew upon the banking house in the usual mode, as between banker and customer, by cheques, without any intervention on the part of the treasurer, who, except as being partner in the bank, never received or paid any money, on behalf of the savings' bank. On his appointment, however, he entered into the usual bond with a surety, and the trustees and treasurer, for twenty years, uniformly, in the annual returns represented to the commissioners for the reduction of the national debt, that the last balance of the institution, for the time being, was in the hands of the treasurer, in that capacity, and, therefore, represented it as being under the protection of 3 & 4 Will. IV. c. 14, s. 28 (one of the statutes relative to savings' banks, at that time in force,) and also under the protection of the board.

At the end of the above period, the banking firm became bankrupt; and it was held that, at that time the balance was in the hands of A., as treasurer, and might be recovered in full, by the trustees of the savings' bank, out of his separate estate. It was considered to be unnecessary to decide, whether the banking firm was also jointly liable to the trustees; but the trustees of the savings' bank, were held liable to the costs of the proceeding, as having allowed of irregularities in conducting the business of the institution.(*h*)

(*g*) Ex parte Orford, De G. M. & G. Bank. Rep. 83; see Ex parte Harris, De G. Bank. R. 162; Ex parte Whipham, 3 M. D. & De G. 564; all cases where the society, &c., was only on the ordinary footing of customer of the bank; Ex parte Riddell, 3 M. D. & De G. 80, is detailed above, p. 345; and is the case, where one member of a banking firm was appointed treasurer of a savings' bank, and, on the bankruptcy of the firm, the savings' bank was held entitled to have the whole of the moneys of theirs, in his hands, repaid in full; see Ex parte Appach, 1 M. D. & De G. 83.

(*h*) Ex parte Riddell, 3 M. D. & De G. 80. •

[*346] **Treasurers of Corporations.*—An incorporated company, authorized by their private act to appoint a treasurer, from whom they were required to take security by bond, in a sufficient penalty, for the faithful execution by such treasurer of such office; Dilworth & Co., bankers, in partnership, were duly elected treasurers, and the members of the firm jointly and severally bound themselves, in a penalty of 20,000*l.*, for the due performance of the duties, &c., and also to pay all balances, &c., to the company, when thereunto required by the said company. Dilworth & Co. afterwards became bankrupt, with a large balance belonging to the company in their hands.

But, notwithstanding that it was shown that the account was kept, in most respects with the bankers as *treasurers*, and not as a banking account is ordinarily kept, with a customer, yet, there having been no demand made by the company, to pay over the balance, in the hands of the bankers, before the bankruptcy, and, consequently, no breach of the condition of the bond, the Court of Chancery held the company disabled from proving against the bankers *under the bond*, either jointly or separately.⁽ⁱ⁾

Trustees, Executors, &c.—For the guidance of trustees, executors, and other persons filling representative characters, in dealing with bankers and *vice versa*, it will be proper to state some principles, with brief illustrations.

If the executors and trustees, under a will, having contracted to purchase land, sell out stock, just before the time at which the purchase seems to be completing, and deposit the proceeds, intending merely a temporary deposit, in the banking house with which the testator, for many years, had kept an account, and the principal clerk in which had been his confidential adviser in pecuniary affairs, they cannot be held in equity, to be responsible, if the bank fails with the deposit in its possession.^(k)

[*347] **But it must not be too hastily concluded that, in all cases,* where no fraud or gross negligence can be imputed, agents, &c., are freed from responsibility. Thus, it has been held, that any agent, even an agent acting gratuitously, who pays money of his principal, even with knowledge of the principal, into his (the agent's) banker's, to his own account, there mixing it with his own moneys, this last circumstance not being shown to be known to the principal, is liable, on failure of the bank.^(l)

So, an assignee of a bankrupt paying in money mixedly to his own account, without denoting it as money of the estate in a separate account, is liable on the bankruptcy of the bankers.^(l)

(i) *Ex parte Lancaster Canal Company*, Mont. R. 44; and see, as to construction of similar condition, *Ex parte Fairlie*, id. 17.

(k) *France v. Woods*, Taml. R. 172; see *Lord Dorchester v. Earl of Effingham*, id. 279; *Rowth v. Howell*, 3 Ves. 565; *Knight v. Earl of Plymouth*, 3 Atk. 480; *Adams v. Claxton*, 6 Ves. 226; *Wren v. Kirton*, 11 Ves. 377. So if the bank is robbed of the money; *Jones v. Lewis*, 2 Ves. sen. 241.

(l) *Massey v. Banner*, 1 Jac. & W. 241, 248; see *Pennell v. Deffell*, 4 De G. M. & G. 383, 390; *Fairlie v. Freeman*, 3 Meriv. 40, 43; *Napier v. Staples*, 2 Molloy,

The rule generally applicable to dealings of trustees with banks, has been sometimes put thus: if a trustee, &c., deposits trust money in a bank of *good credit*, he is exonerated if the bank fail with the money in its possession.^(m) But, probably, it would be difficult to assign any very precise meaning to these terms; and in fact the requirement seems to be, that the trustee, agent, &c., shall act with as complete bona fides, and therefore with as much circumspection and care, as any prudent man would do in the transaction of his own business. Now, a person paying another's money, intrusted to his keeping, into a banker's, mixedly with his own, cannot be said to act in the required manner; for the trust money thereby becomes liable to any set-off that the banker may have against the trustee: if the banker fails, the *cestui que trust* is left without any mode of *showing for how much he is entitled to prove [*348] against the bankrupt's estate: if the trustee fails, the whole of the sum which stands to the trustee's credit in the banker's books, goes to the assignees: if the banker's course of business is to pay interest on money deposited, the trustee makes advantage of the *cestui que trust's* money, by having the interest debited to him: and lastly, he obtains credit, from the largeness of the balance in his favour at his bankers, so that it has been held to be an employment of money in trade, where the trustee was a person engaged in trading, and so deposited trust money.⁽ⁿ⁾

So, an attorney paying in client's money to his bankers, to his own account, mixing it with his own, is liable on the failure of the bank, to pay the whole to the client.^(o)

If an attorney, employed to get in assets, &c., in the country, and remit to town, procure a bill of exchange, drawn by a banker on his correspondent in London, but, by mistake, made payable to his order, so that it becomes necessary for him to indorse, he is not personally liable as indorser, either to the indorsee, or to the bankers with whom this bill may have been deposited, for purpose of presentment for payment, &c.^(p)

A sole executor and trustee of the residuary personal estate and effects of the testator, in trust for his widow, for her life, and after her decease to pay, or otherwise divide the same in equal shares amongst his children, pays 300*l.*, part of the assets, into an old established banker's, at Chichester, who had for many years been his own bankers, with a direction in writing to invest the money in consols in his name, for the purposes of the trust. Instead of doing so, the bankers, without his knowledge, open a new account with him, in which they give him credit for 300*l.*, the executor *and another person, his partner, having a joint account with the bank, in which no notice of the 300*l.* [*349] appeared. The executor, relying that the investment had been duly

270; per Lord Lyndhurst, 3 Cl. & F. 66; Melland v. Gray, 2 Coll. Ch. R. 300; see Sidn. Smith's Chanc. Prac. 440, 5th edit.

(m) Belcher v. Parsons, Ambl. 219; S. C., 1 Ld. Keny. 38.

(n) Roche v. Hart, 11 Ves. 61; Ex parte Hilliard, 1 Ves. jun. 91, and cases there cited; Melland v. Gray, 2 Coll. Ch. R. 301.

(o) Robinson v. Ward, Ry. & M. 274; 2 Car. & P. 59.

(p) Kidson v. Dilworth, 5 Price, 564.

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made, never called for the transfer note, or made any other inquiry, and remained in ignorance that the investment had not been made, until the bankers became bankrupt, a period of nearly five months. The executor proved for the 300*l.*, under the *fiat*, and insisted that he was not bound to account for more than the dividend received, alleging that the employment of bankers was the necessary, and only course available to a person resident in the country, to invest money in the government funds; but he was decreed to pay the whole 300*l.*, with interest, at four per cent., and costs.(*q*)

Payment by bankers to one of several trustees, of the proceeds of stock, sold out under a joint power of attorney from the trustees, does not discharge the bankers, as against the other trustees, unless the one trustee be authorized by the others, or, perhaps, unless to pay to one be the usual course of business.(*r*) At law, when trustees all join in a receipt, *prima facie* all are considered to have received the money;(s) but executors not being bound to join in a receipt, if they do, whether they are all liable, will depend on their having acted.(*t*)

A will contained the usual clause, that the trustees should not be liable for any loss or damage which might happen, without their wilful default, or by the misfeasance, failure, or insolvency of any banker with whom the trust moneys might be lodged for safe custody, or investment, or otherwise, in the execution of the trusts.

There were three executors and trustees of the will, one of them being the testator's brother, to whom a moiety of the residuary property was given over absolutely, in the *event of the testator's infant [**350*] daughter dying under age, and unmarried. The trusts were, *inter alia*, to convert, with all convenient speed, such parts of the testator's personal estate as should not consist of money, and to invest the surplus, &c., in some parliamentary stock.

A banking-house which had been employed by the testator, continued to be employed after his death by the trustees, as the bankers of the trust estate; the house failed, and the trustees were held to be personally chargeable, with the loss of a sum of trust money, which they had allowed to remain an undue length of time in the bankers' hands, instead of investing it, and with which in their hands, the bankers failed.(*u*)

So, where executors advanced to their bankers part of the testator's assets upon the personal security of the bankers, who appear to have given accountable receipt notes, bearing interest, for the money, which was to be distinct from the general account current, they were held liable for the loss.(*x*)

(*q*) *Challen v. Shippam*, 4 Hare, 555; and see S. C., reported in Hill on Trustees, 376.

(*r*) *Stone v. Marsh*, Ry. & M. 364; see *Innes v. Stephenson*, 1 My. & Rob. 145.

(*s*) *Brice v. Stokes*, 11 Ves. 319. (*t*) *Joy v. Campbell*, 1 Sch. & L. 341.

(*u*) *Moyle v. Moyle*, 2 Russ. & M. 710, where see inconvenience of arrangement that all three should concur in signing cheques, *id.* 714.

(*x*) *Darke v. Martyn*, 1 Beav. 525; *Anon.*, Lofft. R. 492; *Lewin on Trusts*, 276; comp. *Wyatt v. Wallace*, Coop. Rep. Temp. Cottenham, 155. Claim of banker creditor, how made on administration summons, *Sidn. Smith's Eq. Pract.* 361.

Executors, being merchants and copartners, residing at Limerick, had before and at the time of the death of the testator, kept an account with Roberts & Co., bankers, in England, as their agents and correspondents, and on the death of the testator, had opened another and separate account, as executors: the executors being greatly overdrawn in account with the bankers, the latter determined to apply all the assets of the testator which they had or should receive by virtue of the power of attorney given them by the executors for that purpose, to the satisfaction of the separate debt due from the firm to them; they accordingly sold out stock of the testator, and instead of carrying the proceeds to the executorship account, they carried it to the mercantile *account, and they then closed the executorship account, to the credit of [*351] which there was, at that time, a considerable balance in their books: the executors having at the time full notice and knowledge, authorize the bankers by power of attorney to collect and receive the assets.

The bankers, remitting the amount to the executors, in course of their duty as agents, and afterwards applying the assets, in payment of the amount of such remittances, are not responsible, in respect of misapplication by the executors, they not being privy to any intention of misapplying the assets: (y) and it seems that even if they had reason to believe that the executors were misapplying the money, they would still be bound to act as they did; at least they could not be responsible for paying over, to the principals, money placed in their hands, for the purpose of being remitted to them. (y)

The distinction seems to be this: if a banker, employed to receive and pay over the assets of a testator, pay them over, so that they may be applied to the purposes of the will, he is not responsible for the executor's misapplication, but if, in dealing with the executor, he pays the assets, for the private purposes of the executor, he is *particeps criminis*, in a breach of trust, and he is equally a party to the breach of trust, whether he applies the money, to the debt, or to the trade of the executor. (z)

If bankers of trustees, wrongfully sell out stock of the trustees, and apply it to their own purposes, the measure of their liability in equity, is the sum paid in replacing the stock. (a) If one of the banking firm sells the stock, unknown to the partners, but under circumstances such that they might, by the exercise of proper diligence and attention, have discovered it, equity will impute knowledge, and hold them all liable. (a)

*If one executor places the testator's money in the hands of the other, who happens to be a banker, so that the act is not an [*352] improvident act, the executor depositing, is not chargeable, in case of a loss, inasmuch as if he had been sole executor, and had, under the same circumstances, deposited at a banker's, he would not have been liable. (b)

If three executors have an account in their names, with a banker, and one draws a cheque, it seems the bankers may refuse to cash it, if they have received notice from one of the others, not to part with the money. (c)

(y) Keane v. Roberts, 4 Mad. 332, 356; see Davis v. Spurling, 1 Russ. & M. 64.

(z) See per Sir J. Leach, 4 Mad. 358, 359. (a) Sadler v. Lee, 6 Beav. 324.

(b) Chambers v. Minchin, 7 Ves. 198; Wms. Exors. 1552.

(c) Gaunt v. Taylor, 2 Hare, 413.

An executor, placing money, which he ought to have invested, in his banker's hands, mixed with his own account, is liable for the amount, on the failure of the bankers.^(d)

Receiver.—A receiver, under an order in chancery, is not liable, for sums deposited with a banker in good credit, provided there is nothing to attach fraud, and no laches, (as if he has left the money, an unwarrantable time, in the banker's hands,) on the failure of the banker. In such a case, a receiver will be liable, if he leaves money in the hands of his bankers, and receives interest upon the sums so deposited, and the bankers fail.^(e)

Committees of Management, &c.—A banker's receipt, of deposits paid in respect of a projected railway, &c., is not, necessarily evidence of payments of the deposits, to the committee of management. Thus, where the letter of allotment stated, "A receipt will be granted by the bankers to whom the deposit is paid, which will be exchanged for scrip, &c.," and a list of banks was added; it was held, in an action by a depositor, against three members of the committee of management, for money had, and received, &c., that the receipt of his deposits, given him, by one of [353] the banks, in the *list, was no evidence of his money ever having come to the hands of, or ever been at the disposal of the defendants.^(g)

Stock in Public Funds.—The nature of stock and money in the public funds, is this: stock is a chose in action; it has no locality, except for the purposes of probate and administration; it does not fall under the head of goods and chattels, so as to pass by a grant of *bona et catalla felonum*; ^(h) it has been said neither to be a chattel, nor to have any resemblance to a personal chattel; ⁽ⁱ⁾ it cannot be sued for as money, ^(k) it does not pass under the term "money," in a will; ^(l) but it does pass under the term "securities for money," unless the expression be controlled by the context; it is doubtful, it seems, whether the same is true of Bank of England Stock. ^(m) However, stock in the funds has been said to pass, or not, under the word "moneys," or the word "goods," or the word "chattels," according to the whole context of the will, and either "goods," or "chattels," used simply, and without qualification, will pass it in a will; ⁽ⁿ⁾ and where the testator did not bank with the Bank of

(d) Fletcher v. Walker, 3 Mad. 73.

(e) Drever v. Maudesley, 8 Jur. 547.

(g) Watson v. Earl of Charlemont, 12 Q. B. 856.

(h) R. v. Capper, 5 Price, 217.

(i) Wildman v. Wildman, 9 Ves. 119; see 5 Price, 262, 263. But they are "goods and chattels" within the reputed ownership clause, 12 & 13 Vict. c. 106, s. 125; Brown v. Bellasis, 5 Mad. 53; Ex parte Richardson, Buck, 480. Semble, they are not "goods or commodities" within the Bankrupt Act, 12 & 13 Vict. c. 106, s. 35; see Colt v. Netterville, 2 P. Wms. 308.

(k) Nightingale v. Devisme, 2 W. Bl. 684; nor is "money" in a contract, convertible with "stock;" Jones v. Brinley, 1 East, 1; see 5 H. Lds. 268.

(l) Ex parte Simpson, De G. Bank. R. 9; Gordon v. Dotterill, 1 My. & K. 56; 21 L. J., Chanc. 843; Willis v. Plasket, 4 Beav. 208; Douglas v. Congreve, 1 Keen, 410; Hotham v. Sutton, 15 Ves. 319; but see Rogers v. Thomas, 2 Keen, 8.

(m) Bescoby v. Pack, 1 Sim. & St. 500; 2 Dr. & War. 548.

(n) Kendall v. Kendall, 4 Russ. 360.

England, a bequest of "all my money in the Bank of England," passed stock in the funds.(o)

*The Governor and Company of the Bank of England are constituted, by the statute 11 Geo. IV. & 1 Will. IV. c. 13, s. 10, [*354] book-keepers, with respect to the three-and-a-half per cent. stocks, created under that statute; it is a duty which they owe, to all the persons, who may be interested in the fund, so to keep the account, as that it may distinctly appear, at all times, what transfers and assignments have been made; and a person who once has had stock standing in his name, and afterwards finds it does not stand in his name, has a right in equity, if he has done nothing to transfer it, to have it replaced by the bank. An action at law, it is said, is an inadequate remedy.(p)

If any person shall wilfully make any false entry in, or wilfully alter any word or figure in any of the books of account, kept by the Governor and Company of the Bank of England, in which books the accounts of the owners of any stock, annuities, or other public funds, which now are, or hereafter may be transferable at the Bank of England, shall be entered and kept, or shall, in any manner, wilfully falsify the accounts of such owners, in any of the said books, with intent, in any of the said cases, to defraud any person whatsoever; or if any person shall wilfully transfer any share or interest of, or in any stock, annuity, or other public fund, which now is, or hereafter may be, transferable at the Bank of England, in the name of any person, not being the true and lawful owner of such share or interest, with intent to defraud any person whatsoever, every such offender shall be guilty of felony.(q)

The transfer of stock, in the public funds, is further guarded, by making it felony to forge such transfer; or to forge a power of attorney to transfer, or to receive dividends *thereon; or to effect a transfer, or receive dividends thereon, by false personation of the [*355] owner.(r)

Moreover, the Court of Chancery is empowered summarily to restrain the Bank of England, from permitting the transfer of any stock, in the Public Funds, or from paying dividends thereon.(s)

Also the personating, of any person, who is an owner of stock in Public Funds, or of dividends thereon, and thereby endeavouring to transfer the stock, or receive the dividends, is felony.(t)

Clerks, or any person employed, or intrusted, by the Bank of England, wilfully making out dividend warrants, for a greater or less sum than what is really due, with intent to defraud any person whatsoever, are also guilty of felony.(u)

(o) *Gallini v. Noble*, 3 Meriv. 691; see *Howell v. Gayler*, 5 Beav. 157; see *Johnson v. Digby*, 8 L. J., Chanc. 38; *Sheffield v. Earl of Coventry*, 2 Russ. & M. 317; *Low v. Carter*, 1 Beav. 426; *Parker v. Marchant*, 1 Y. & C. Ch. C. 290, and 2 id. 279; 1 Phil. 356. As to bequest of bank stock, *Lindgren v. Lindgren*, 9 Beav. 358; see 25 L. J., Ch. 573.

(p) *Sloman v. Bank of England*, 14 Sim. 486.

(q) 11 Geo. IV. and 1 Will. IV. c. 66, s. 5.

(r) 11 Geo. IV. and 1 Will. IV. c. 66, s. 6.

(s) 5 Vict. c. 5, s. 4; as to affidavit, *Ex parte Field*, 1 Y. & C. Ch. 1.

(t) 11 Geo. IV. and 1 Will. IV. c. 66, s. 7.

(u) 11 Geo. IV. and 1 Will. IV. c. 66, s. 9. As to the practice, on transfer of stock, see *Lawson*, Hist. Bank. 177.

An indictment for forging a transfer of stock is good, which charges the falsely making, forging, and counterfeiting, a transfer of, &c., with the name of the owner thereunto subscribed, &c., "purporting to be a transfer, from the owner, to one William West, of the Stock Exchange," &c., and then setting out the forged instrument, although nowhere showing that the stock had been accepted, by the alleged *transferor*, previous to the alleged transfer, nor that the transfer was witnessed according to the statutes, or the rules and directions of the Bank of England.(x) It was contended, before all the judges, that without showing this, it did not appear that the alleged owner was legally entitled, which by the statute he was not, until he accepted; but the judges held, nevertheless, as above, and the prisoner received sentence of death, and was executed accordingly.

It appears to be the practice, that dividends may be *received, [*356] at the bank, before the stock has been *accepted*; and that it is the duty of the clerk, to see the acceptance duly made, on occasion of paying the dividends: in general, no transfer of stock can be made, according to their practice, until it is accepted.(y)

Where a statute declared the stock, created under it, to be transferable, as the act directed, and not otherwise, and then enacted, that the entries of transfer shall be signed, by the parties making such transfers, &c., and that any person to whom such transfer shall be made, shall underwrite his acceptance thereof, and that no other method of transferring such stock shall be valid; and a person alleging himself to be holder of stock, brings an action against the Bank of England, for not paying dividends, he cannot dispute the title of the transferee, on the ground that such transferee has not underwritten his acceptance, the claimant of the dividends having himself executed the transfer, in the prescribed mode,(z) and pocketed the price of the stock.

The statute in question expressly enabled the transferor to act by attorney, but there were no such words as to the transferee underwriting the acceptance; however, it seems always to have been the practice, to allow of the latter act being performed by attorney, equally with the former.(a)

At law, it seems, the stock vests, by the transfer, for many purposes, without acceptance;(b) the direction, as to acceptance of this statute, appears only to have reference to the rights of the transferee, against the bank.(c)

(x) Gade's case, 2 Leach, Cro. Ca. 732; Transfer Ticket, id. 737; see observations, 8 Q. B. 705; Rules and Regulations of 1832, Lawson's Hist. of Banking, 186.

(y) 2 Leach, Cro. Ca. 739. Stamp on mortgage, as security for the transfer or retransfer of stock; Sweet, Supplement, Bythew. Conv. 253, 254.

(z) Foster v. Bank of England, 8 Q. B. 869. On issue joined, whether plaintiff was owner of the stock or not, held plaintiff was entitled to inspect the entry in the bank books respecting the transfer of this particular stock, but that entry only, S. C.; form of such entry, S. C., id. 703. In an action by transferor against transferee, clerk from bank may prove signature to acceptance; bank books need not be brought up, Mortimer v. McCallan, 6 M. & W. 58.

(a) 8 Q. B. 703, 704, 705.

(b) See Gade's case, 2 Leach, C. C. 732; 8 Q. B. 705.

(c) 8 Q. B. 706. The power of attorney to transfer stock, it seems, by the usage

*If any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged, or altered, [*357] any note, or bill of exchange, of the Governor and Company of the Bank of England, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any indorsement on, or assignment of, any bank note, bank bill of exchange, or bank post bill, with interest, in any of the cases aforesaid, to defraud any person whatsoever, every such offender shall be guilty of felony. (*d*)

In an indictment, on this statute, though it would be incorrect to describe a bank post bill, as a "bill of exchange," it may be described, as a bank bill of exchange. (*e*)

With respect to the evidence of the intent to defraud, it is enough, if the jury are satisfied, that the purpose to defraud existed in the mind of the accused, when he did the act, for which he is indicted, although, in fact, no person was defrauded; (*f*) or, from circumstances not known to the defendant, it was impossible that any person could have been defrauded, (*g*) (but this does not extend, it seems, to render a defendant liable upon an instrument which, if genuine, would have been void, (*h*)) or the person, to whom the forged instrument is uttered, believes that the defendant did not intend to defraud *him*; at any rate, where to defraud *this person, would be the natural consequence of the act of uttering, because every one must be taken to contemplate [*358] the necessary consequences of his own act. (*i*)

A forged power of attorney, as has been observed, has no effect to transfer stock standing, in the name of A., to the name of B.; consequently, since it is clear that the bank is liable at the suit of A., if it obeys a forged power of attorney, and transfers accordingly: (*k*) in such circumstances A. may recover damages against the bank, for not making a transfer, from A. to a purchaser of a part of the stock, or of the whole of it. (*k*)

If, however, A. had known of the forgery, and refused, or omitted to apprise the bank of it, such conduct would disable him from recovering. (*l*)

and practice of the bank, is revocable by a stock holder, acting personally, without deed; R. v. Wait, 11 Price, 518; S. C., 7 Moo. 473; see Lawson's Hist. Banking, 178; Bromley v. Holland, 7 Ves. 28. Stamp on bond to replace stock; Blair v. Ormond, 14 Q. B. 732; on mortgage, as security, for that purpose; Sweet, Supplem. Bythew. Conv. 253. Letter of attorney, which is part of security for money, is not revocable; Abbott v. Stratton, 3 Jo. & L. 603. An authority, coupled with an interest, is not revocable; Gaussen v. Morton, 10 B. & C. 731; see 8 Rep. 82.

(*d*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 3. As to signing bank notes by machinery; 1 Geo. IV. c. 92, s. 3.

(*e*) R. v. Birkett, Russ. & R. 251.

(*f*) R. v. Crooke, Stra. 901; R. v. Goate, 1 Ld. Ray, 737.

(*g*) R. v. Holden, Russ. & R. 154; Reg. v. Marcus, 2 Car. & K. 356.

(*h*) R. v. Wall, 2 East, P. C. 953, in case of a will; R. v. Moffat, 1 Leach. Cro. Ca. 431, case of B. of Exchange.

(*i*) R. v. Shepherd, Russ. & R. 16; R. v. Harvey, 2 B. & C. 261; Putting v. Tucker, 4 B. & A. 382; and see now 14 & 15 Vict. c. 100, s. 8.

(*k*) Coles v. Bank of England, 10 A. & E. 449; Hume v. Bolland, 1 Cro. & M. 130.

(*l*) Stracy v. Bank of England, 6 Bing. 754; there the right of action was suspended by the act of the plaintiff, *id.* 773.

If one of two trustees of stock forges the signature of his co-trustee, to a power of attorney, and, under it, sells out stock, and absconds, the bank is compellable, in a court of equity, to re-invest the stock, in the name of the other trustee.^(m)

A joint tenant of a sum of stock cannot legally transfer *his* share; for virtually, at least in the case of two joint tenants, that would amount to the power of transferring the whole;⁽ⁿ⁾ and if the survivor of two trustees of stock, in which A. was beneficially interested for life, with remainder to B., dies, leaving B. his personal representative, and B. *voluntarily* assigns the stock to A., but no transfer is actually made, equity will not either declare B. to be a trustee for A., or compel a transfer.^(o) It is [*359] regarded in the light *of an imperfect gift, in regard to which, the donor has not done all that is in his power to do. It is different, in the case of a valuable consideration, for the assignment.

Inspection of Books.—The books of the Bank of England cannot be inspected, by persons who have no interest in them, or who seek an inspection, for purposes of a private nature, unconnected with the objects for which the books are kept.

A fund-holder has a right to inspect, and copy entries relating to the stock and its transfers, &c., in which he is interested; but he has only the right, as to the particular entries, relating to the particular parcel of stock, and no other;^(p) and they are, accordingly, liable to furnish a list of such of their books, as contain entries of stock, in which the party applying is concerned, and the Courts of Equity enforce this.^(q)

The bank books are, in general not removable, on the ground of public inconvenience,^(r) and they are now provable, either by examined or by certified copies.^(s)

The bank books are the best evidence of the transfer of stock, but still, it was not always necessary, that they should be produced to afford this proof; the signature of the alleged transferee, might be proved, by a person who knew the party's handwriting, and had inspected the signature of acceptance, &c., in the books, &c.;^(t) but it was *said, [*360] when the question is whether the handwriting itself is genuine, the books must be produced.^(u)

Formerly, it was obligatory on the Bank of England, by certain statutes, to register such parts of every will, as bequeathed any estate, property, or interest in any public stocks, or in any dividends arising

(m) *Sloman v. Bank of England*, 14 Sim. 475.

(n) 14 Sim. 488.

(o) *Beech v. Kempe*, 18 Beav. 285.

(p) *Foster v. Bank of England*, 8 Q. B. 689. Stock broker's certificate, when evidence of funds in books of Bank of England, *Glynn v. Bell*, 2 Beav. 17; see *Bretton v. Cope*, Peake R. 30.

(q) *Heslop v. Bank of England*, 6 Sim. 192; see 1 Meriv. 409; *Gough v. Davies*, 4 Price 200, 215.

(r) *Mortimer v. McCallan*, 6 M. & W. 58, 67, 69; Tayl. Evid. 1233, 2nd edit.; *R. v. Gordon*, Dougl. 572, n.; *Davis v. Bank of England*, 2 Bing. 404.

(s) 14 & 15 Vict. c. 99, s. 14; see 22 L. J., Chanc. 696.

(t) *Mortimer v. McCallan*, 6 M. & W. 58. Expenses of identification at bank; *Jones v. Powell*, 6 Beav. 488; *Davenport v. Powell*, 14 Sim. 275.

(u) *Anriol v. Smith*, 18 Ves. 206. Costs of transferring, *Hopkinson v. Roe*, 1 Beav. 183.

therefrom; but by a later statute,^(x) the provisions of which are subjoined, the Bank of England is relieved from this burden; and, instead, it is now made sufficient, if, before permitting the transfer of such stocks, or the receipt of any dividends upon stocks, standing in the name of any deceased person, they register the name of the deceased person, and of his executors, or administrators, respectively, as the case may be. The probate and letters of administration are to be registered as formerly. Since the statute referred to also, all stocks in the public funds, standing in the names of any deceased person, may be transferred by the executors or administrators, notwithstanding any specific bequest or disposition, thereof in the will.

The Bank of England, however, is not bound to permit of the transfer of the stock, or the receipt of any dividends, by the executors or administrators, until the probate of the will, in the first case, or the letters of administration in the other, shall have been left at the Bank of England, for the registration thereof. But, though there be a specific devise, the bank are bound to permit the executor to transfer, unless it can be shown that he has assented to the legacy.^(y)

The bank may also insist upon all the executors, who shall have proved the will, joining and concurring in every transfer of the stocks, or of any part of them.

**Dividend Warrants.*—By an usage of bankers and merchants in London, the Bank of England drafts upon their cashiers [*361] for the payment of dividends on government stock—commonly called dividend warrants—with the receipts already subscribed, were passed from hand to hand, like promissory notes of a bank, and paid by the cashiers of the Bank of England to bona fide holders, after a certain day; the admission of the payee that he has received the money appearing on the document, and making it, as far as the bank is concerned payable to bearer a few days later than the date of the receipt. But it has been holden by the Court of Exchequer Chamber, that such instruments, on the face of them, not being negotiable by the general law of the land, and the usage not immemorial, so as to be capable of being considered the custom of the city of London, and, therefore, binding upon every one in the city, whether he knew of it or not, did not form the only mode by which dividends were payable. Therefore, if A., an owner of government stock, gives a power of attorney to B., authorizing him to receive and give receipts for the dividends thereon, and B. gets from the bank a dividend warrant accordingly, which he passes for good consideration to C., who requires payment of the dividends by the bank to him, the Bank of England, it seems, are not compellable at law to pay C. the dividends, and could not on that ground, resist the payment of them to A., the real owner, it not appearing to the court that the transaction between B. and C. was bona fide, as regarded C.,^(z) and the court doubted whether a bona fide holder could compel payment.^(a)

(x) 8 & 9 Vict. c. 97.

(y) *Franklin v. Bank of England*, 9 B. & C. 156; S. C., 1 Russ. 575; S. C., 4 L. J., *Chanc.* 214; and as to costs. In that case the practice of the bank was upset.

(z) *Partridge v. Bank of England*, 9 Q. B. 396. Form of dividend warrant, *id.* 406, 416.

(a) See 9 Q. B. 426.

If an usage had been established, as above stated, and the owner of the stock had been cognisant of the usage, and *assented to it, [*362] it might be that he could not have sued the bank, though they had paid C.(b)

If the Bank of England make an unreasonable delay in passing a power of attorney for the transfer of stock, they are liable in damages for any loss sustained in consequence; they are to have time to take all reasonable means for clearing up any doubt as to the authenticity of the power of attorney, which they may reasonably entertain; but it is for the jury to say, whether there was reasonable cause of doubt, and whether reasonable means were taken to ascertain the truth; and if they negative these propositions, there must be a verdict for the owner of the stock, which the bank have unreasonably delayed the transfer of.(c)

On the other hand, it is obvious that a reasonable delay, according to the circumstances of each case, must be allowed to the Bank of England, in order to investigate the claim, because the property in stock is not transferred by means of a forged power of attorney to the name of another person in the books of the Bank of England; and they are responsible in the full value, or to replace the stock, if they obey a forged power of attorney,(d) though the holder may disable himself by negligence from recovering.(e)

This being the case, it follows,—and it follows a fortiori,—that they are responsible, by way of action, if they refuse to transfer, and a *mandamus* does not therefore go to compel them to transfer.(f)

A power of attorney to transfer stock, has been held to be a deed within 2 Geo. II. c. 25, and therefore the forging of it was a capital felony.(g)

[*363] *In an action, however, against the bank, for the nonpayment of dividends in the three per cents, &c., alleged to be due, and payable to the plaintiff, he must show, and prove, that the money to discharge the dividends has been received by the bank from the government, for the bank have no more than the care of the stock; and, it must be shown that they have funds, before they can be proved to have committed a breach of duty, in not paying them over to the plaintiff.(h)

Trusts.—The Bank of England, it has often been said, does not take notice of trusts; they are not to look beyond the legal title; therefore they cannot prevent an executor selling out, or transferring into his own name,(i) and are not chargeable, if he transfers to persons not entitled under the will.(k) There is a case decided in relation to this point, a good many years ago, in which the facts were these:—

(b) Per Parke, J., 1 B. & Ad. 605; see 9 Q. B. 411, 412.

(c) Sutton v. Bank of England, 1 Car. & P. 193; S. C., Ry. & M. 52; see 9 J. B. Moo. 771.

(d) Davis v. Bank of England, 2 Bing. 393; S. C., 9 J. B. Moo. 747, 774; see 6 Bing. 772.

(e) Coles v. Bank of England, 10 A. & E. 437, 449.

(f) R. v. Bank of England, 2 Dougl. 524; Com. Dig. Action on the Case, A. 4.

(g) R. v. Fauntleroy, 2 Bing. 413.

(h) Bank of England v. Davis, 5 B. & C. 185; 7 Dowl. & R. 828; see 10 A. & E. 439, 449; 8 Q. B. 690; 3 Ir. L. R. (N. S.) 314.

(i) Bank of England v. Parsons, 5 Ves. 665; see 8 Ves. 522.

(k) Hartiga v. Bank of England, 3 Ves. 55.

A transfer was made of stock at the bank, in the name of a *feme covert*, by her husband, which stock, it was suspected, she held, by virtue of a trust to her separate use. A memorandum was made by the bank on the transfer, indicating that a flaw was suspected in the title. This, it was held, must not be allowed; it was further held, that no secret trust, as against the party having open legal title, will affect the bank.

Lord Mansfield added, "I won't say a word against the holder of the stock having his action against the bank, for disparaging his title."^(l)

The fact is, if the bank looked beyond the legal title, for instance, if they took notice of the trusts of a will, they must be held to take notice throughout, and therefore they would have to stand the consequence of resulting trusts, and such *trusts as would be raised by a court of equity;^(m) in fact, if so, they would be charged with all the [*364] trusts in the kingdom.⁽ⁿ⁾

In reality, there is nothing in the statutes relating to the establishment or regulation of the bank, which makes them trustees of the public funds for any person; if they voluntarily enter in their books a trustee's account, they may, under certain circumstances, become liable for the obligation of those trusts; they stand much in the same relation to stock, that a depositary of goods does to the goods; if they have notice that the person in whose name the stocks stand, is not the real owner, or holds subject to a claim, and they, nevertheless, allow the transfer to be made, there they may be, but then only, responsible for the transfer.^(o)

It is common, in order to avoid the frequent recurrence of the necessity of appointing fresh trustees—at least it is not uncommon when the property is considerable—to appoint, in the first instance, four trustees; for then, on the decease of one, or even of a second, of the trustees, there still remains the check, which one mind may be supposed to have over tendency to dishonesty in the other.

In general, it is a rule with the Bank of England, not to allow a fund to be transferred into the names of *more* than four joint owners.

In cases of a special character, as many as five or six have been admitted, *ex. gra.* If A., B., C. and D. are trustees of one sum upon certain trusts, and were also trustees of another sum, upon different trusts, the bank, to prevent a confusion between the accounts, will permit the transfer of one sum into the names of A., B., C., D. and E.^(p)

When an account at a banker's is opened, with two or *more trustees, it is safest for the trustees to lay down the rule that [*365] cheques shall not be valid, unless signed by *all*; this is not always practicable, but it always avoids the consequences that may result to the rest of the trustees, who have allowed one or more of the body to take the sole management; each of the rest will be personally liable for any loss,

(l) Lady Mayo's case, Lofft's R. 65.

(m) Bank of England v. Parsons, 5 Ves. 669; see 3 Ves. 58.

(n) 3 Ves. 58.

(o) Humberstone v. Chase, 2 Y. & Col. Ex. 209; see 9 B. & C. 156; 1 Russ. 575.

(p) Lewin on Trusts, 83, 2nd edit.; Hill on Trustees, 452, 453.

if he has diminished the security of the trust fund by any conduct, or laches, or negligence on his part.^(q)

Any claimant to an interest in stock, transferable at the Bank of England, standing in the name of any other person, &c., in the bank books, who is desirous to restrain the transfer of such stock, or to restrain the payment of the dividends thereof, issues a *distringas*, prepared by his solicitor, and sealed by the clerk of records and writs, in the form prescribed in a late statute.^(r) The writ is then to be served on the Bank of England, together with a notice not to permit the transfer, or not to pay the dividends, as the case may be.

That a person has obtained a *distringas* under s. 5, is not, *per se*, an objection to his also obtaining a restraining order under s. 4.^(s)

Such restraining order continues in force until discharged, after a bill has been filed for the purpose of restraining, &c.;^(t) or, until the court varies or discharges it.^(u)

As the bank can look only to the legal title to the stock, it follows, that they cannot pay the dividends to any one else but the person having the legal title, under any circumstances; the following is a strong example of this:—

A testator dies, possessed of a large sum in the funds, a sum of 5,000*l.* of which, he bequeaths to A.; this stock to stand in the name of the [*366] executors. Then a judgment is *obtained against A., and the creditor takes out a judge's order, under 1 & 2 Vict. c. 110, ss. 14 & 15, charging with the judgment debt, so much of the dividends only as was payable to the sole use and benefit of A. Accordingly, the bank refused to pay the dividends upon the sum of which the testator died possessed, to the executors; they, therefore, brought an action against the bank, to recover one half-year's dividend then due; and the bank applied for a stay of proceedings, on payment of such portion of the dividends as the court should direct; but the court considered the application to be unnecessary; because the bank was not affected by the judge's order, which bound the executors, not the bank; their duty, in such case, is to pay the dividends to the executors, the legal owners of the stock, who are answerable in equity for the proper application of the dividends,^(x) upon the production of the judge's order, charging the stock, or dividends.^(y)

The statute 1 & 2 Vict. c. 110, s. 14, prevents any proceeding being taken, to have the benefit of the charge, until after the expiration of six calendar months from the date of the charging order; but, nevertheless, the Court of Chancery will make a stop order at the instance of the credi-

(q) *Williams v. Nixon*, 2 Beav. 475.

(r) 5 Vict. c. 5, s. 5. Form of affidavit, Orders, 1841; Beav. Ord. Canc. 186; Sidn. Smith, Chanc. Pract., 5th edit. 488.

(s) *In re Marq. of Hertford*, 1 Hare, 584; S. C., 1 Phill. 129.

(t) *In re Marq. of Hertford*, 1 Phill. 203.

(u) 1 Phill. 207.

(x) *Fowler v. Churchill*, 11 M. & W. 57, 323; S. C., 2 Dowl. N. S. 767; *Bristed v. Wilkins*, 3 Hare, 235; *Smith v. Ward*, 15 Sim. 56; see 1 Beav. 605; 4 De G. M. & G. 374.

(y) See 2 Dowl. N. S. 565; 2 Exch. 744; and see *Rogers v. Halloway*, 5 M. & Gra. 292; *Robinson v. Burbidge*, 9 C. B. 289.

tor, to prevent the debtor from receiving dividends of the stock accruing within the six months.(z)

Where a question of equitable lien on the stock is depending, and the bank, in consequence, refuses to permit a transfer of it; the bank is regarded as a stakeholder, and the Court of Chancery refuses to make an order to compel the *bank to permit the making the transfer;(a) [*367] on the other hand, the Courts of Equity, on a proper application, will restrain the bank from transferring stock, without notice to the party interested.(b)

A purchaser of a life interest in stock, sold before a master in chancery, was held to be entitled to a dividend becoming due on the day next after the sale.(c)

Where the bank is *necessarily* made a party to a suit for the transfer of stock into the name of an executor, to whom it had been bequeathed in trust, and the bank is made party for the security of the legacy, its costs are paid out of the legacy.(d)

All trustees,(e) or other persons, having any annuities or stocks standing in their name in the books of the Bank of England, or any government or parliamentary securities standing in their names, or in the names of any deceased person of whom they shall be personal representatives, upon any trust whatsoever, *or the major part of them*, (*i. e.* the major part of the trustees or other persons,) shall be at liberty to transfer or deposit such stocks, or securities, into or in the name of the Accountant-General of the High Court of Chancery, with his privity, in the matter of the particular trust, (describing the same by the names of the parties, as accurately as may be, for the purpose of distinguishing it,) in trust, to attend the orders of the said court. And in every such case, the certificate of the proper officer of the transfer, or deposit of such stocks, or securities, shall be a sufficient discharge to such trustees, or other persons, for the *stocks, or securities, so transferred, or deposited.(e) And the [*368] Court of Chancery will make order on petition—not motion(f)—in respect of such stock and securities, or dividends, &c., &c. The order to have the same effect as if it had been made in a suit regularly instituted.(g)

If trustees join in a receipt, *prima facie*, all are considered, at law, to

(z) *Watts v. Jefferyes*, 3 Mac. & G. 372; *Bristed v. Wilkins*, 3 Hare, 235. It is only a common law judge who can make this order. *Hulkes v. Day*, 10 Sim. 41. As to stop order, S. C., and see 13 Sim. 259. As to form of judge's order, *Robinson v. Burbidge*, 1 L. M. & P. 94; see *Graham v. Connell*, id. 438; *Morris v. Manesty*, 7 Q. B. 674; and see *Robinson v. Wood*, 5 Beav. 388.

(a) *Birch v. Corbyn*, 1 Bro. Ch. C. 571. As to transfer of stock into court, *Headl. Dan. Pract. Ch.* 1650; from one account to another, id. 1658; transfer of stock out of court, id. 1659.

(b) *Ex parte Field*, 1 Y. & Col. Ch. 1; 5 Vict. c. 5, s. 4; see 40 Geo. III. c. 36; *Headl. Dan. Pract.* 155, 157, 1552; *Perkins v. Bradley*, 1 Hare, 232, as to costs; *In re Marq. of Hertford*, 1 Hare, 584, form of affidavit; and see 1 Phill. 129.

(c) *Anson v. Towgood*, 1 Jac. & W. 637.

(d) *Hammond v. Neame*, 1 Swanst. 35; see *Headl. Dan. Pract.* 1551.

(e) 10 & 11 Vict. c. 96, s. 1; and see 12 & 13 Vict. c. 74, amending this act.

(f) *Harrison v. Masselin*, 21 L. J. Chanc. 53.

(g) 10 & 11 Vict. c. 96, s. 2; see *General Orders*, *Beav. Orders*, 369.

have received the money, *(h)* but executors are not bound to join in a receipt; if they do, whether they are liable or not, will depend on their acting. *(i)*

The Lord Chancellor is now empowered *(k)* to make an order, in writing vesting in any person or persons the right to transfer the stock standing in the name of a lunatic trustee, or mortgagee, or the right to receive the dividends, as the case may be: and when the stock stands in the name of the lunatic, jointly with other persons, the order may vest such right, either in the other persons, who are jointly interested with the lunatic, or in them jointly with other persons. *(l)* So, where stock is standing in the name of a deceased person, trustee, whose personal representative is a lunatic, a similar order may be made. *(l)* So, in the case if the person in whose name, jointly with others, the stock stands upon any trust, is out of the jurisdiction of the Court of Chancery, *(m)* or cannot be found, *(n)* or concerning whom it is uncertain whether he is living or dead, an order may be made to vest the right, &c., either in such of the original trustees as are within the jurisdiction, &c., or to vest it in them, together with other persons. *(o)*

[*369] **Infant.*—So, when an infant shall be entitled to any stock, upon any trust, or shall be entitled, jointly with other persons, upon any trust, an order may be made to vest the right, &c., in any person or persons, in the first case,—in either, the persons interested jointly with the infant, or in those persons, together with others, in the second case. *(p)* Also, when any person shall neglect or refuse to transfer stock, or receive dividends, for twenty-eight days after date, of an order in Chancery, an order may be made, vesting the right, &c., in any person, &c. *(q)* And the Bank of England is bound to comply with all such orders, vesting the right to stock, to transfer stock, or to receive dividends, and with powers of attorney, executed by such appointees, under such orders. *(r)*

Feme Covert.—If stock stand in the name of a married woman, in the books of the bank, it seems that there may be circumstances, in which she might maintain an action for the dividends, subject to a plea in abatement for the non-joinder of the husband; *(s)* that is to say, unless the bank pleads in abatement, she may recover.

Stock in the public funds, standing in the names of two persons jointly, on the death of the one, becomes at law, the absolute property of

(h) Brice v. Stokes, 11 Ves. 319.

(i) Joy v. Campbell, 1 Sch. & L. 341.

(l) 13 & 14 Vict. c. 60, s. 6.

(n) See 12 Sim. 161.

(o) 13 & 14 Vict. c. 60, s. 22. As to person out of jurisdiction, *Ex parte Bradshaw*, 22 L. J., Ch. 180.

(p) 15 & 16 Vict. c. 55, s. 3. Since this act, the court may make the order, in case of an infant sole trustee, though out of the jurisdiction. *Cramer v. Cramer*, 5 De G. & S. 312.

(q) 15 & 16 Vict. c. 55, s. 4. So in case of personal representative of deceased person refusing, s. 5; see 5 De G. & S. 338; 5 Russ. 284.

(r) 15 & 16 Vict. c. 55, s. 6, remedying the difficulty in *Re Smyth's Settlement*, 4 De G. & S. 499.

(s) See *Dalton v. Midland Counties Railway Company*, 13 C. B. 474.

(k) 13 & 14 Vict. c. 60, s. 5.

(m) See 5 Sim. 498; 3 C. B. 967.

the survivor, and therefore the administrator of the deceased cannot maintain against the survivor an action at law, to recover the deceased's share, although, if there be a trust in favour of a third person, the survivor may be responsible in a court of equity to dispose of the property according to the trust.(t)

*It would seem, that in all cases, other than those provided for as above by the various statutes cited, of a number of persons [*370] paying in money, in their joint names, to the Bank of England, in case one or more of them should abscond, there would be a necessity for an application to a Court of Chancery, to enable the remaining members of the original number, or body, to get out the money, unless they could satisfy the bank that the others were dead.(u)

Contracts for Sale of Stock.—A contract for the sale of stock, differs from a contract for the sale of a specific chattel; inasmuch as stock does not belong to the head of chattels, as before observed;(x) and, therefore, a contract for the sale of stock would be satisfied, by the delivery of any stock of the description bargained for; consequently, what is usually called a contract for sale in such case, does not mean an actual sale, but only a contract to deliver, and such contract is not a contract for the sale of "goods, wares, or merchandise," within the 17th section of the Statute of Frauds, so as to require a memorandum in writing.(y)

It may be well for bankers, and other traders, to remember, that no bankrupt is entitled to a certificate of conformity, who shall, within one year next preceding the issuing of the *fiat*, or the filing of the petition of adjudication, have lost 200*l.* by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract; and railway stock is within the enactment.(z)

Generally, with respect to shares, it must be remembered, in cases where a power of attorney "to sell, assign, and transfer," is held by an agent, that does not give him the *right or power to pledge for [*371] his own purposes, as to secure his own debt; the same is true of a power of attorney, in like terms, as to stock in the funds; those dealing with the party who acts *ex mandato*, must look to the mandate, to see whether he is acting within its scope.(a)

There is, however, no such analogy, (as regards specific performance,) between a contract for the sale or purchase of a sum in the three per cent. consols, or any other government stock, which is always in the market, and to be had by any person who applies, and where the vendor's contract is fulfilled and satisfied by the tender of any three per cent. stock, and a contract for the sale or purchase of *specific* shares, which

(t) *Crossfield v. Such*, 8 Exch. 825; S. C., 22 L. J., Exch. 325.

(u) *Ex parte Collins*, 2 Cox, Ch. C. 427.

(x) Sup. p. 353.

(y) *Heseltine v. Siggers*, 1 Exch. 856; see plea of gaming, &c., *Knight v. Fetch*, 15 C. B. 566.

(z) *Ex parte Mattheson*, 1 De G. M. & G. 459; *Ex parte Copeland*, 2 De G. M. & G. 914.

(a) *De Bouchont v. Goldsmid*, 5 Ves. 211; *Wilson v. Moore*, 1 My. & K. 351; see 7 Moo. P. C. 76. Stamp on letter of attorney to sell, transfer, or receive dividends of stock and exemptions. Sweet's Supplement, Bythew. Convey. 249.

are *numbered*, and of course cannot be had to a larger extent than the limited number, and may not, therefore, be in the market at all, as regards specific performance of the respective contracts; for there may be a specific performance of the latter, and equity will enforce it; there cannot be of the former.^(b)

If a bankrupt, for the purpose of defrauding his creditors, purchase stock, of which he obtains the transfer into a fictitious name; the courts of equity will afford relief *to the creditors*, by ordering the Bank of England to erase the fictitious name and insert that of the bankrupt as the transferee;^(c) but it seems doubtful whether anything the courts can do will save the bank from the risk of applications by persons whose real names may be identical with the feigned name, which appears on the books as, at one time, owner of the stock;^(d) the alternative is, for the [*372] bank *never to admit the name of the transferee, without being satisfied that there is a real person corresponding with the description of the alleged transferee. Possibly it was some consideration of this kind, which led to the difference above mentioned, as made by statute between the transferor and transferee; the one having a right to transfer by power of attorney; the other not being empowered to accept by attorney.

Charity Trusts.—The Bank of England, according to a case of great importance, which was much discussed and finally decided in the Court of Exchequer Chamber, in Ireland, and which, so far as it is of authority at all, bears directly on the subject now before us, is bound, in cases where stock in the public funds stands in the name of an incorporated body—*ex. gra.* a body of trustees of a charity—to be acquainted with the corporation, so as to have a genuine authority for the disposal of the property, by transferring it into another name. It is not sufficient to examine the seal with which the power of attorney to transfer is sealed, to see if it is the common seal of the body, for that may have been affixed without authority of the corporation, in which case the power of attorney is not their deed, and does not bind them; but the attestations to the affixing of the common seal must also be examined, in order that the bank may be satisfied that the authority is valid, according to the statutes; unless the bank know or find, upon inquiry, that such attestations are made in the handwriting of two credible witnesses, they will not perform their duty if they permit the transfer to be made, although they may be satisfied that the sealing has been effected by the use of the common seal of the body. They are bound to as minute and careful an inquiry before they transfer, or permit the transfer of the money, as if the money were their own; anything less than this makes [*373] them liable, for they are parliamentary *bailees of the stock, with the obligation imposed upon them for profit of keeping the books, which constitute the muniments of the owner's title.^(e)

(b) *Duncuft v. Albrecht*, 12 Sim. 199; see 5 Hare, 242.

(c) *Green v. Bank of England*, 3 Y. & Col. Ex. 722.

(d) See *Davis v. Bank of England*, 9 J. B. Moo. 747; and see 3 Y. & Col. Exch. 724. Inspection of books of Bank of England, 1 Meriv. 409; *Seton's Decrees*, 13, 14.

(e) 3 Ir. L. R. (N. S.) 354, 355, 372; see *Young v. Grote*, 4 Bing. 253; *Marsh v. Keating*, 2 Cl. & F. 264.

Corporations.—Not only is the Bank of England liable, as has been said, if it transfers government stock in virtue of a forged power of attorney, in ordinary cases of individuals, but if the common seal of a corporate body holding stock, be improperly affixed to a letter of attorney, without the knowledge or consent of the corporation, even though affixed by their agent, provided they have not subsequently ratified his act, and, in consequence, and upon the production of the forged instrument, the bank make the transfer, they are liable in an action, at the suit of the corporation, for not transferring the stock, and for permitting it to be transferred without the authority of the plaintiffs.(f) The agent in the case referred to had signed the power of attorney, and his signature was well known at the bank to be that of the agent of the corporation; but the attestations affixed were forgeries. In fact, it is the duty of the bank to prevent the entry of a transfer in their books, until they are satisfied that the person who claims to be allowed to make it, is duly authorized so to do. Were the law otherwise, the whole property of every stockholder would be at the mercy of the bank clerks. If it could be shown that the corporation neglected to take proper measures for the safe and close custody of its common seal, so as to be chargeable with having itself contributed to the loss, then, perhaps, according to the rule, that, of two innocent parties, he shall bear the loss whose conduct has *led to the result, the corporation, as between them and the bank, [*374] must suffer.(g) If, however, the corporate body were trustees only of the stock, they might be answerable over in equity to the *cestuis que trustent*. It is to be observed, also, that there would be this objection to the plaintiffs being defeated, even on the above supposition, namely, that the attestations are a statutory part of the power of attorney, and that the plaintiffs could not be said to have authorized the agent to forge the attestations.(g)

Unclaimed Dividends.—By the 56 Geo. III. c. 60, all stock in the public funds, upon which dividends have remained unclaimed for ten years, is authorized to be transferred to the account of the commissioners for the reduction of the national debt, in the books of the Bank of England; the statute also authorizes the Bank of England to re-transfer such stock to any person who shall show, to the satisfaction of the governor of the Bank of England, his right or title thereto, but if the governor shall not be satisfied of the legality of such claim, the courts of chancery or exchequer may, upon petition of such claimant, &c., make order for the retransfer, &c.

Under this statute it is not necessary for the claimant to show himself to be beneficially interested in the stock; to prove a legal claim to it is sufficient.(h) But then it is not a matter of course, where there is any-

(f) Bank of Ireland v. Evans's Trustees, 3 Ir. L. R. (N. S.) 280. Forgery of such attestations, felony, 11 Geo. IV. and 1 Will. IV. c. 66, s. 8. It will be cogent to show the non-assent of the corporation to the act of their agent, if they have prosecuted him to conviction for the forgery, at their own expense.

(g) See Ir. L. R. (N. S.) 314, 322, 323-336, 352.

(g) 3 Ir. L. R. (N. S.) 374.

(h) In re Bigg, 1 Y. & Col. Exch. 245; see Ex parte Holland, 8 Jur. 253; 1 Phill.

thing to indicate the parties not to be beneficially entitled, to order a re-transfer upon the claimants making out a legal title, such as a transfer would have been made to him upon, if the ten years had not elapsed; thus, if the stock stands in the name of two persons, of whom one survives the other upwards of ten years, but has not, during that time, [*375] *claimed any dividends, the court refuses, upon petition of the survivor's widow and personal representative, to order the stock to be re-transferred into her name, or into the names of the two deceased persons, but directs a reference to inquire who is entitled to the stock, with liberty to state special circumstances.(i)

It is the legal owner of the stock—the person, or his representatives, in whom is the legal title—that is to have the re-transfer; the *cestui que trust* has no right to it.(k)

Bank Stock.—An investment by trustees of trust money in Bank of England Stock, though it be practically as safe as any government funds, is not regarded by the courts of equity as a proper disposition of trust moneys, and, upon knowledge of the existence of the fact that such an investment has been made, they will order the stock to be sold, and the proceeds invested in the three per cents. If, therefore, any loss should be occasioned to the trust estate by the fluctuation of the bank stock, or of the government stock, between the dates when the investment was made by the trustee, and the re-investing in the three per cents., the trustee must make good the difference.(l)

But, upon a loss sustained by the result of depreciation in the three per cents., the trustee, upon a proper investment, is not liable for the difference.(m)

An extraordinary division of a sum of money among the proprietors of bank stock, beyond the usual dividend, by way of bonus, is considered as an accretion to the capital; therefore, the tenant for life of the bank stock, in respect of which the division is made, is not entitled to the sum given by way of bonus, but only to the dividends upon it considered [*376] *as capital, as they accrued during his life;(n) it makes no distinction that the division was in money, and not in stock; that did not cause it to be considered as a profit arising and payable in the time of the tenant for life, and to which, therefore, he was entitled, inasmuch as all the profits, ordinary and extraordinary, arose in the same way.(n)

The courts of equity are in the habit of making orders in such cases, to lay out the money in some of the public funds, and to pay over the dividends to the tenant for life, during his life.(n)

Ch. R. 379, as to costs; and *Ex parte Martin*, Jac. 55; *Hunt v. Peacock*, 6 Hare, 361.

(i) *Ex parte Ram*, 3 My. & C. 25; see in case of bankruptcy, &c., *Ex parte Gillett*, 3 Mad. 28; see further, *Ex parte Lavell*, 2 Jac. & W. 397.

(k) 3 Mad. 33; see 8 & 9 Vict. c. 62.

(l) *Hancom v. Allen*, 2 Dick. 498; *Clough v. Bond*, 3 My. & C. 496; see 7 Ves. 137, 150.

(m) *Peat v. Crane*, 2 Dick. 499, n.; see 3 My. & C. 496.

(n) *Brander v. Brander*, 4 Ves. 802; *Irvine v. Houston*, (Dom. Proc. 1802,) 10 Ves. 189; 14 Ves. 70, 78; 13 Price, 774; *Paris v. Paris*, 10 Ves. 185; *Clayton v.*

Nor does it make any difference that the "participation" in the interest and profits be mixed by the bank with the ordinary $3\frac{1}{2}$ per cent. dividend, and the two declared as a single dividend of $8\frac{1}{2}$ per cent. (o) But when it appeared to the court, in the case of tenants for life, who had been in possession of the bank stock for a number of years, that the dividends declared by the bank had increased from $2\frac{3}{4}$ per cent. to 3 per cent., and from 3 per cent. to $3\frac{1}{2}$ per cent., and then 5 per cent. was declared as "the dividend of interest and profits for the half-year," &c., and the tenants for life had, it appeared, taken the several dividends, except the last, without question, but on occasion of the last dividend it was sought by the remainderman to set up a right to some portion of this dividend, (which had been declared differently from most of the other cases in a lump sum, without mentioning anything about bonus;)—Lord Eldon intimated that he had no means of ascertaining *whether [377] any, or what part, of the dividend was capital, as alleged, and gave the whole to the tenant for life. (p)

Bequests.—Where a person is possessed of money in consols and other government securities, and also of bank stock, and devises "all his fortune then standing in the funds," the bank stock does not pass. The reason is, that the words "the funds" have received an interpretation to mean "the public funds," as appears from the Stamp Acts, which have always made a distinction between bank stock and the government funds. (q)

Stamps.—All bills of exchange, or bank post bills, issued by the Bank of England, are exempt from stamp, as are all their promissory notes for the payment of money. (r)

Deposits with Bank of England.—The Bank of England is largely engaged as a bank of deposit; and in such cases, nearly, if not altogether, the same rules apply to its regulation, and as regards its relations to customers, as have been stated in respect of banking establishments generally; thus, where a customer is in the practice of making his acceptances of bills of exchange payable at the Bank of England, and, in a particular instance, such an acceptance of his was presented at a quarter after nine, and left till eleven o'clock, A. M., and then refused payment for want of assets, and being afterwards, at six, P. M., presented again, was again refused payment by a person stationed by the bank, although the bank, before six o'clock, had received *sufficient assets to cover [378] the bill; it was considered that the bank were not liable, as for

Gresham, 10 Ves. 290; Witt v. Steere, 13 Ves. 363. Stamp on Transfer, Sweet Supp. Bythew. Conv. 274. Bequest of bank stock, Lindgren v. Lindgren, 9 Beav. inf. p. 377.

(o) Witt v. Steere, 13 Ves. 363, 365; see 14 Ves. 79. Semble, the shareholder in such case has an action at law to recover the whole dividend declared; see Davis v. Bank of England, 2 Bing. 393; 10 A. & E. 449; 1 Mac. & G. 698. Holder of bank stock not liable as such in bankruptcy; 8 Geo. I. c. 8, s. 43.

(p) Barclay v. Wainwright, 14 Ves. 66; Norris v. Harrison, 2 Madd. 279. The question was not between tenant for life and remainderman, and the bonus was made capital by statute. See Matthews v. Maude, 1 Russ. & M. 397.

(q) Grainger v. Slingsby, 21 L. J., Chanc. 573.

(r) Sweet, Supplem. Byth. Conv. 209, 266. Receipts of Bank of England and other bankers, when exempt from stamp, and when liable, id. 268, 208.

negligence, at the suit of the acceptor, because the second presentment took place after banking hours; but it seems that they would have done well, and perhaps it is their duty, to inform the person presenting the bill on that occasion, that they had then received assets, with which the bill would be paid next day, which, in fact, was done.

The direction given to the jury was according to the rule already stated, that they must be satisfied, not only that the bank had assets at eleven o'clock, when the payment was refused, but that the money had been paid in to the plaintiff's account, a reasonable time before eleven o'clock, to enable them to know that such was the case; and the defendants were found not guilty, and the court upheld the verdict.(s)

Proving in Bankruptcy.—With respect to bankruptcy and the mode of proceeding which the bank is to adopt, in relation to the bankruptcy of its customers, the following principal points have been determined.

At the first public sitting appointed by the court, assignees of the bankrupt's estate and effects shall and may be chosen and appointed; and all creditors, who have proved debts to the amount of ten pounds and upwards, shall be entitled to vote in such choice; and also any person authorized by letter of attorney, from any such creditor, upon proof of the execution thereof, either by affidavit, or by oath before the court, *vivâ voce*.(t)

Now, persons having interests adverse to the general body of creditors, cannot be elected; therefore a banker who receives money under the bankruptcy, is ineligible for assignee.(u)

[*379] *All creditors who have proved debts, &c., may vote. Now, all bodies politic, and public companies, incorporated, or authorized to sue, or bring actions, either by charter or act of parliament, may prove by an agent, provided such agent shall, in his deposition, swear that he is such agent, and that he is authorized to make such proof.(x) But it seems that the Bank of England, prior to this statute, was admitted to prove by their clerk without power of attorney.(y)

Then proof having been made on behalf of the bank, it may vote in the choice of assignees, by a person authorized, by a special power of attorney.(z)

A., being a separate trader, is also a partner in a firm of B., C., and A. The firm indorse a bill of exchange to A., who discounts the bill with the Bank of England, (with whom he keeps an account in his own name,) indorsing it to them. The bank was aware of the partnership of B., C., and A.

On the bankruptcy, it was contended for the bank, that its practice required the customer's indorsement of the bill, for the purpose of additional security to them, and that therefore they were entitled to prove, both against the joint estate of the firm and the separate estate of A.

(s) Whitaker v. Bank of England, 1 Cro. M. & R. 744.

(t) 12 & 13 Vict. c. 106, s. 139.

(u) Ex parte Lacey, 6 Ves. 625.

(x) 12 & 13 Vict. c. 106, s. 164.

(y) Ex parte Bank of England, 1 Swanst. 10; 1 Rose, 142, overruling 18 Ves. 229; see 2 Dru. & War. 377.

(z) Ex parte Bank of England, 1 Swanst. 19.

But Lord Eldon, C., was of opinion, that the practice of the bank did not vary the nature of the bill, for it substantially was a joint and several security. In bankruptcy, the proof, in such case, was confined to a right of election between the joint or the separate estate. In all cases in which the holder has been allowed to avail himself of his security to the full extent, there has been either an ignorance of the partnership, or a subdivision of them into distinct trading establishments. Here the distinct trade was, in fact, no more than his separate estate.^(a)

**Discounts*.—The following case has been decided on the subject of discounts :— [380]

The payee of a foreign bill of exchange annexes a condition to his indorsement, before acceptance, thus, "Pay the within sum to Messrs. Clerk and Ross, or order, upon my name appearing in the Gazette as ensign in any regiment of the line, between the 1st and 64th, if within two months from this date, R. Robertson."

The bill was drawn upon, and accepted by, Kensington & Co., bankers, in London, but not till after it was indorsed by the payee, as above, and after it was indorsed by Clerk and Ross. Then there were several mesne indorsements, until it came by indorsement to the Bank of England, who discounted it. When the bill was at maturity, including the days of grace, the Bank of England presented it to Messrs. Kensington, by whom it was paid.

Robertson's name never having appeared in the Gazette, &c., the condition of the indorsement was not performed; and, upon his suing the acceptors for the amount of the bill, the court considered him to be entitled to recover; because the bankers, Kensington & Co., had accepted after the condition had been superadded to the bill, and that condition had been superadded to the bill at the outset, and before it got into circulation, and the condition not having been performed, and the acceptance having been made with knowledge of the restriction, the property, in such case, reverted to the payee, who had a right to come upon the acceptors, at maturity, just as if he had not indorsed at all.

Hence it follows, that such a bill cannot be safely discounted, without ascertaining that the condition on which the payee indorses has been satisfied.^(b)

(a) Ex parte Bank of England, 2 Rose, 82; see Ex parte Martin, id. 87; Ex parte Bank of Scotland, id. 197; see Flather's Arch. Bank., 11th edit. 123. By 12 & 13 Vict. c. 106, s. 87, notice to accredited agent of a public company is to be deemed notice to the company in cases of acts of bankruptcy. What amounts to notice by letter, Bird v. Bass, 6 M. & Gra. 143. For various points relative to Bank of England, see Rules and Orders, 1 Fonbl. Bank. R., App.; Flather's Bankr., 11th ed. 354, &c.

(b) Robertson v. Kensington, 4 Taunt. 30.

[*381]

*CHAPTER XIII.

DISCOUNTS.

MUCH of the business of bankers consisting in the discounting of bills of exchange, it is necessary to state some points of the law as affecting this matter.

The rule has been stated, that if a person holding a bill of exchange deliver it to a banker to be discounted, or if, by the course of dealing between the customer and banker, bills received by the latter, on account of the former, are considered by both parties as cash, minus the discount, so that the customer is at liberty to draw on the banker, as against those bills, beyond the amount of actual cash that may be standing to his account in the books, then, in the event of the bankruptcy of the banker, the assignees of the bankrupt are entitled to the bills. For where the banker discounts a bill for a customer, giving him credit for the amount of the bill, and debiting him with the discount, there is a complete purchase of the bill by the banker, in whom the whole property and interest in it vests, as much as in any chattels he possesses; (a) so much so, that, on his bankruptcy, the property and interest passes to the assignees.

Therefore, discounting in this way makes the banker *the purchaser of the bill*.

If, however, a person discounts bills with bankers, and receives, in part of the discount, other bills, not indorsed by the bankers, and these latter bills turn out to be bad, the bankers are not liable; for, having taken them without indorsement, the holder takes the risk on himself, inasmuch as the bankers, by refusing to indorse them, have refused to [*382] *pledge their credit to their validity, and the transferee must be taken to have received them on their own credit only. (b)

On the other hand, a banker discounting a bill, whether for a customer or a stranger, there being no indorsement by the customer or stranger, and the bill not being given in payment of an antecedent debt, is a mere purchaser, and on the bankruptcy of the acceptor, has no recourse against the party from whom he took it. (c)

Presumption in favour of Bankers.—Such a degree of credit is given to bankers by the courts, that *prima facie* they will be taken to have discounted with good faith. Thus, where a clerk was sent by his master, a customer of a bank, to ask for discount for a bill, but with orders to tell them, when he asked for it, the particulars of an arrangement be-

(a) *Carstairs v. Bates*, 3 Campb. 301; *Paley, Princ. and Agent*, 72.

(b) *Fyde v. Clark*, 1 Esp. 447.

(c) *Governor, &c., of Bank of England v. Newman*, 1 Ld. Raym. 442; S. C., 12 Mod. 241. Where the bill discounted is also indorsed, as in *Warwick v. Rogers*, 5 M. & Gra. 351, 352, it is otherwise; *Bull. N. P.* 277; see 21 L. J., Q. B. 404. Indorsement *pri. fac.* evidence of intention to discount, not to deposit as security; *Ex parte Towgood*, 19 Ves. 229; see *Ex parte Whitter, Cooke, Bank. Law*, 147, 8th edit.; *Ex parte Roberts*, id. 147; *Van Wort v. Woolley*, 3 B. & C. 445, 446; per Parke, B., in *Alsager v. Currie*, 12 M. & W. 755, 757.

tween the holder and the master, the Court of Exchequer would not presume that the clerk told the bankers (who discounted the bill) these circumstances, but, on the contrary, presumed that they bona fide discounted the bill, without notice of those circumstances, in the absence of proof to the contrary. *(d)*

Negligence.—Where bills are discounted before acceptance, many circumstances may throw the loss, if they are refused acceptance, upon the bankers.

Thus, where A., living at Wooler, in which place the bankers (carrying on business at Berwick,) had also a branch bank, dealt with traders, residing at Wakefield, and had been used, on selling goods to them, to draw bills *on them, which he got discounted at the Wooler branch, from whence they were transmitted to the bankers, at [383] Berwick, who sent them to Wakefield, to the traders, for acceptance; and they had been warned by the traders, in writing, to inquire, on discounting any bills that A. might draw upon them, whether he had delivered the goods, he valued for, and sent the carrier's receipts to them, assuring the bankers that, in that case, the bill would be accepted; and afterwards the bankers discounted a bill, and sent it for acceptance to the traders, who, after retaining it for ten days, saying they could not accept it, stating the invoice of the goods had not been sent, and, after detaining it sixteen days more, returned it unaccepted, the bankers having made no objection to their detaining it: and then A. stops payment, without delivering the goods, or sending the carrier's receipt to the traders; the bankers were held to have no claim upon the traders, the drawers of the bill, who had never accepted it.

The bankers were unaware of the insolvent condition of A., at the time they discounted the bill for him.

The precise question was, whether the circumstances amounted to a constructive acceptance—a question which could not arise at the present day, because since 1 & 2 Geo. IV. c. 78, s. 2, no acceptance of an inland bill, and, since 19 & 20 Viet c. 97, ss. 6, 7, no acceptance of *any* bill, can be good, except made in writing, on the bill—but the case is detailed here as an instance of the effects of negligence in discounting. *(e)*

Palmer, having borrowed money from his bankers, in Calcutta, deposited East India Company's paper with the bank, to a greater amount than the debt, as a collateral security, and authorized the bank, in default of repayment *of the loan, by a given day, to sell the paper for reimbursement of the bank, rendering him any surplus. [384] Before default in repayment of the loan, he became insolvent: at the time of the insolvency the bank were also holders of two promissory notes of Palmer & Co., which they had discounted for them before the transac-

(d) Middleton v. Barned, 18 L. J., Exch. 433.

(e) Mason v. Barff, 2 B. & A. 26. A promise to accept a bill not yet drawn, though the promise be in writing, and though bill has been discounted on faith of it, not an acceptance; Bank of Ireland v. Archer, 11 M. & W. 383. As to existing bill, see Wynne v. Raikes, 5 East, 514; see Ex parte Hobhouse, 2 Deac. 291.

tion of the loan and the agreement as to the deposit of the Company's paper. The time for the repayment of the loan having expired, the bank sold the company's paper, the proceeds of which, after satisfying the principal and interest due on the loan, produced a considerable surplus.

In an action by the assignees of Palmer & Co., against the bank, to recover the surplus, it was held, that the bank could not set off the amount of the two promissory notes; and that the clause of mutual credit in the Bankrupt Act did not apply. For though the bank gave credit to Palmer for the notes they had discounted for him, there was no corresponding credit given by him to them; it was uncertain whether there would be any money coming to him or not; the credit was all on one side.(*f*)

Bankers discount for A., a customer, bills of exchange to a large amount, placing the amount thereof to the credit, and the amount of the discount to the debit, of themselves. A. becomes bankrupt, having, at the time, a balance at the bank in his favour, of 179*l.* 19*s.* 11*d.* The bills were indorsed by the bankers in blank, and some of them were paid by the acceptors, *before* the bankruptcy; the others, far exceeding in amount the above sum, did not become due till some time *after* the bankruptcy. Before they became due the assignees commenced an action for money lent, &c., to recover the above balance, and subsequently, but still before the bills became due, the bankers proved against the bankrupt's estate for the whole amount of the bills, deducting the balance of 179*l.* 19*s.* 11*d.*

[*385] *There was held, in this case, not to be any purchase of the bills, but only the ordinary discounting, or loan of money upon them.(*g*) The bankers might have sued the bankrupt (before his bankruptcy) for money lent on them; they might have proved against him, (after his bankruptcy,) had the bills been dishonoured: and as a bill may be proved against an indorsee, just as against the drawer, previously to its being dishonoured by the acceptor, so the bankers were entitled, by the terms of 6 Geo. IV. c. 16, s. 50,(*h*) to set off these bills in the action brought against them by the assignees, this being a case of mutual credit.(*i*)

It is material to distinguish this case from the last. In that there was no mutual credit; the company's paper was deposited for a particular purpose, and no credit was given for the surplus. Also, the duty of the assignees there was to redeem the paper immediately, and if they had done so, no debt whatever would have been due in respect of the loan. Here was a mutual credit, and the bankers being entitled to set off, the assignees could not prevent them having the benefit of it, by bringing the action too soon.(*i*)

(*f*) *Young v. Bank of Bengal*, 1 Moo. P. C. 150; see per Parke, B., 12 M. & W. 754.

(*g*) See discount distinguished from loan, *Gwatkin v. Campbell*, 1 Jur. (N. S.) 131, Chanc.

(*h*) See now 12 & 13 Vict. c. 106, s. 171.

(*i*) *Alsager v. Currie*, 12 M. & W. 751, 757, 758. N. B.—It was there denied that the discounter of a bill is a purchaser of it.

A partnership arrange with their bankers, so that the latter were to discount indorsed bills of exchange, to the extent necessary to meet such acceptances, &c., of the partnership, as were in course of immediate payment at the banking house. In order to meet certain acceptances of the partnership coming due, they remitted to the bankers an indorsed bill; these acceptances were, however, dishonoured by the bankers, who, shortly after, stopped payment. The bankers then procured the bill to be accepted, and made an entry in their books of their having discounted it; but, as they had no right to discount the bill, without *per- [*386] forming the trust reposed in them, the title to the bill did not pass to their assignees, and the partnership must have it given up to them.(k)

Bills are remitted to be discounted, the proceeds being directed to be applied in a particular way: the remittee did not get the bills discounted, but received the money on them when due. Before that time, the remitters had stopped payment, having first desired to have the bills returned to them: they became bankrupt before the bills were paid to the remittee. The latter was held to be liable to the assignees, to refund the whole of the money;(l) and so bills remitted for sale, the proceeds to be applied to a particular purpose, remain the property of the remitters, until the purpose is satisfied.(m)

So, where a customer pays a sum of money to a bank, for the purpose of providing for particular bills, he being at the time indebted, on advances, to the bank to a larger amount, and they, instead of following his instructions, place the money to the credit of his account, and, consequently, the bills were refused acceptance, and whilst they remained unpaid in the hands of the holders, the customer became bankrupt, his assignees recovered *the whole of the sum from the bank.*(n)

A banker, discounting a bill, should pay in cash, or give credit for the amount, debiting, or deducting, for the discount; if he gives a bill, in exchange, he ought to calculate, and allow a rebate of interest for the time the latter has to run; for, if any circumstances of overreaching, or imposition, in this respect, on the customer, should appear, the transaction would, under the old law, have been usurious; and, in *cer- [*387] tain circumstances, such a transaction might still be considered objectionable, as unfair and fraudulent.

In an action, (on a former statute against usury,) it appeared that the defendants were bankers at Portsmouth, and A., a lady residing there, drew a bill for 600*l.*, on her agent in London, payable to defendants, or order, thirty days after date, which the bankers discounted, by giving her their promissory note for 600*l.*, payable in London, at three days after sight. For this, the bankers received a discount of 5*l.* per cent.,

(k) *Ex parte Frere*, Mont. & M'A. 263.

(l) *Buchanan v. Findlay*, 9 B. & C. 738; see as to set-off, *Thorpe v. Thorpe*, 3 B. & Ad. 580; and see 8 A. & E. 772.

(m) *Muttylohl Seal v. Dent*, 8 Moo. P. C. 319.

(n) *Hill v. Smith*, 12 M. & W. 618; the bankers would also be liable to an action for non-performance of the orders, per *Alderson*, B., id. 627; per cur., id. 630; see also *Alder v. Keighley*, 15 M. & W. 117.

calculated on the thirty days the bill had to run, but making no deduction on account of the three days' grace which they took thereon. The money to be received for the bill was to be remitted to London, but the bankers gave their note at three days, without asking any questions as to the mode in which the customer would be paid.

Lord Kenyon, C. J., was clearly of opinion, that this was an usurious contract, whether the person discounting the bill chose to receive a note or cash. If she chose to have a note payable in London, the bankers ought not to have taken interest for the time the note had to run, but should have computed it from the time the note was payable.^(o) But where a banker in the country discounted bills at four months, for a customer, and took the whole interest for the time they had to run, and the customer, on being asked how he would have the money, directed part to be carried to his account, and part to be paid in cash, and the residue by bills in London, some at three, others at seven, and others at thirty days' sight; that was decided not to be an usurious transaction, as the customer had exercised a free option how he would receive the amount,^(p) notwithstanding the bankers had made no rebate of interest on the bills, [*388] which had *a long time to run, remittances to London being usually made by bills, at thirty days.

These decisions are, in truth, now but of minor importance, and are only preserved, as showing how anxious the courts have been to enforce the observance of fairness and scrupulous integrity, which is due from a banker to a customer; and, notwithstanding the abolition of the usury laws by 17 & 18 Vict. c. 90, the courts would probably be inclined to act in the spirit of these decisions, for the protection of the customers of bankers.

A branch of the National Provincial Bank of England, discounts for a customer a bill drawn by him, and accepted by A. B. This bill, which was for 365*l.*, was dated 17th January, and was at three months, and would consequently become due 20th April. On the 19th, the customer brought another bill to the bank, for the same sum as the former, dated 18th April, for the purpose of retiring the former. The manager of the bank consented to retire the former bill, but the course pursued was not strictly a retiring of the bill; for the course taken was, to send up to London the fresh bill, giving directions to their London agents to order payment of the original bill, which had been previously sent up to them by the manager. A. B. was credited in his account with the amount of the bill, 365*l.*, less the discount.

After some time, and various further transactions between A. B. and the bank, had taken place, the bill of the 18th April proved to be forged, and was dishonoured.

Under these circumstances it was contended, in an action by the bank, on the first bill, against the acceptor, that what had been done by the bank in regard to the first bill was equivalent to a payment of it, as they

(o) *Matthews, q. t. v. Griffiths, Peake, N. P. Rep.* 200. In this case a second discount was in fact paid.

(p) *Hammitt v. Yea, 1 B. & P.* 144, 152. In this case no charge was made for commission, stamps, postages, &c.; see 15 Ves. 121; 17 id. 332.

had given the drawer credit for the sum for which it was drawn, *less the discount*; (q) but to this the court did not assent.

Where a customer places, in the hands of his bankers, two *bills for 1,000*l.*, indorsed by him, for the amount of which it was [389] agreed he should draw, the bankers having previously refused to discount them; and the customer only draws for 65*l.*, and the bankers employ a broker to discount the bills, and become bankrupt shortly after the bills were deposited, the customer is entitled to the proceeds of the bills. (r)

Re-discounting.—A customer draws a bill, which is accepted, payable at his bankers'; he discounts it with the bank, indorsing it to them; they re-discount and indorse to a third party.

On the maturity of the bill it is presented, by the holder, at the bank, along with other bills, payable there, all indorsed by the bank; all these were paid without any indication whether the bank paid as indorsers, or agents for the acceptors; the account of the acceptor of this bill is overdrawn at this time, and he stops payment the same day.

Next day notice of dishonour was given, by the bank, to the customer, and he was debited with the amount of it.

It was left to the jury to say, whether the bank paid as indorsers on their own account, or as agents of the acceptor. The jury found that they paid in the former character, which is tantamount to finding the bill was dishonoured, and they had a verdict, and the court held the bankers to have had a right to pay as indorsers, reserving to themselves time to inquire whether they would honour the bill, or not, and that there was no obligation on them to inform the holder in what capacity they paid. (s)

Accommodation Bills.—Where bankers discount for a customer, the drawer, a bill accepted for his accommodation, which is dishonoured, and, after that event, have notice that it was an accommodation bill, and are requested by the customer not to apply to the acceptor, to which they assent, and *afterwards the customer's account with them shows [390] a balance, in his favour, to a larger amount than the bill, the bankers are bound to discharge the bill out of the balance, and cannot keep it as a security for the fluctuating balance, which might ultimately become due to them, and, therefore, if they sue the acceptor, they will be nonsuited. (t)

It made no difference, that after the balance had been in his favour, as above stated, the customer became greatly indebted to the bank, and failed before action. (t)

Death of Drawee.—Bankers, having discounted for a customer, who did not indorse, a bill drawn by B. on A., another customer, and accepted by him, payable at the bankers' house, on the morning of the day in which it becomes due, wrote it off in his account to his debit, having at

(q) Bell v. Buckley, 25 L. J., Exch. 163; see 15 C. B. 87.

(r) Ex parte Edwards, 2 M. D. & D. G. 625.

(s) Pollard v. Ogden, 2 E. & B. 459.

(t) Marsh v. Houlditch, reported Chit. Bills, 289, n., 6th edit.; compare Hammersley v. Knowlsey, 2 Esp. 665.

that time in their hands 1,421*l.*, to the credit of A. The bill was for 467*l.* A. was at this time dead, but this was unknown to the bankers at the time they debited A., &c.

The bankers were held to be entitled, when the bill, in such circumstances, became due, to reimburse themselves out of the acceptor's funds in their hands, having no notice of the death.^(u)

Restrictive Indorsement.—At one time it was held, that a bill of exchange might be arrested at any period of its course of currency, or negotiability, by what was called a restrictive indorsement, *ex. gra.* thus, —“Pay to A. and no one else,”—or, “The within must be credited to B., value on account,” &c., by which means, it was considered, the negotiability was stopped, so that A. or B. had neither of them any right to indorse the bill over; if, therefore, a bank discounted a bill, with such an indorsement upon it, it did so in its own wrong, and the negligence, involved in the act, prevented the bank from recovering the money from *the parties to the bill. Therefore, in a case where a [*391] bill bore an indorsement in the second form of the above examples, and also a subsequent indorsement, purporting to be by B. “to C., or order,” and the bill was discounted by the Bank of England, in the way of business, and then, the acceptor having absconded, a friend of the drawers’ paid the amount of the bill, for the honour of the drawers, and as their agent, and afterwards, it having been found, that the last-mentioned indorsement was a forgery, the drawers sued the bank to recover the amount of the bill, which had been paid by their agent, the bank was held liable to refund the money to the drawers, because, it was said, they ought to have taken notice that the negotiability of the bill was stopped, or destroyed, by the indorsement to B., and not having done so, must stand to the loss.^(x)

A restrictive indorsement is now, however, fully settled¹ to have no power to stop the negotiability of a bill of exchange; for that a bill of exchange, originally made payable to a person named, or his order, is in its nature, negotiable; and if it be afterwards indorsed with such words as, pay to A. and him only, this transfers to A. the whole interest in the instrument, and that interest he may assign as he pleases; any restriction or confinement of his power to assign is contrary to the nature of things, and therefore void. Therefore there is nothing, in a restrictive indorsement, to prevent the restricted indorsee from making any assignment of the bill, so as to confer a title to the bill.^(y) The right of action, [*392] which the subsequent indorsee has, is, it is true, only *for the benefit of the restraining indorser, or of the *cestui que trust*, as the case may be.

^(u) *Rogerson v. Ladbroke*, 1 Bing. 93.

^(x) *Anchor v. Bank of England*, Dougl. 615; per *Ld. Mansfield*, C. J., *Willes* and *Ashurst*, Js.; *Buller*, J., dissentiente. See practice of Bank of England at that time, stated 2 Burr. 1220.

^(y) *Murrow v. Stuart*, 8 Moo. P. C. 267; *Carlton v. Ireland*, 25 L. J., Q. B. 113. The decision in the first of these cases is the more material to be known, as it expressly overruled the contrary doctrine laid down both in *Bayley on Bills* and *Byles on Bills*. There is no difference in this respect between bills of exchange, whether foreign or inland, and promissory notes. 2 Burr. 1224; see *Gay v. Lander*, 6 Dowl. & L. 78.

Hence the decision, previously mentioned, would be departed from at the present day; for it turned upon the assumption, that there might be an effectual restrictive indorsement, *stopping* the negotiability of the bill; from which it was held to follow, that the bank discounting such a bill, as in that case, could not have sued the acceptor, or other parties to it, and therefore under the circumstances of the case, could not retain the money that had been paid in mistake on behalf of the plaintiff. Now, however, that the groundwork of the conclusion is overturned, the conclusion would be different; that is to say, there is nothing to prevent a bank from discounting a bill, which bears a restrictive indorsement to A., with a subsequent indorsement by A. to some one else, or order, &c., and from being able to recover in such case, as well as in any other case of discount.

If, however, a person uses words to show that the restrictive indorsement was made to the restricted, as the agent, or mere servant of the indorser, and that he never was intended to take an interest in the bill; thus, a bill of exchange is indorsed by the payee to A., who indorses to B. thus,—“Pay to B., or his order, for my use,” and B. discounts the bill with his bankers, who, without inquiry, do so, and apply the proceeds of the bill to the use of B.: the property in the bill is held to remain in A., who may sue the bankers.(z)

This, therefore, seems to be the law on the subject: a restrictive indorsement cannot be made to have the effect of stopping, or destroying, the negotiability of a bill of exchange: but an indorsement may be made on a bill, in such a way, as to show the indorser not to have intended that his indorsee should take any interest of his own in the bill, or its proceeds,—that he is nothing more than the hand to *receive [*393] the proceeds—in such case, if the latter discounts with a bank, they must see to the application of the money which they pay to the restricted indorsee, on account of the bill, (it is said;) and the purpose is to prevent a failing man from disposing of the bill before it becomes due and from pledging it to relieve himself from his own debts, at the expense of his correspondent. But such an indorsement does not prevent the indorsee from receiving the money from the acceptor, when the bill becomes due. To the objection that it cannot be expected that bankers, when asked to discount such bills, should look into the accounts between the principal and his agent; it is admitted, that it cannot be expected that they should, but still if they take a bill so indorsed, they take it at their peril, and must be bound by the state of the accounts between those parties.

In the case from which these principles are taken, the court would only say, that such an indorsement constituted the *restricted* indorsee a trustee for the restraining indorser; they expressly avoided the question, whether, if he indorsed over, *all* the subsequent indorsees would be trustees for that indorser; but it seems they did consider the bank, who advanced money on the bill to the restricted indorsee, to be bound

(z) *Sigourney v. Lloyd*, 8 B. & C. 622, where the restricted indorsee had indorsed over to the bankers.

to inquire into the state of the accounts between him and his indorser, so as to see whether he was indorsing for the benefit of himself, or his indorser. In this case, the account between the restraining indorser and his indorsee was in favour of the former, to the amount of more than 3,000*l.*, exclusive of the bill, which was for more than 3,100*l.*; but, on the morning of the day, when the discount was made, the balance of account of the indorsee with his bankers was upwards of 3,700*l.*, in his favour; in the course of the day the balance became largely against him. The bill was paid at maturity, and the bankers received the amount of it.

The bankers were held liable to the restraining indorser, in an action [*394] for the money had and received, on account of *the bill.(a) It is to be observed, that the bankers, in this case, were, in a manner, parties to the application of the money contrary to the indorser's intention, for being the bankers of the restricted indorsee, they themselves applied the proceeds to his account with them.

Perhaps, it may be doubted, whether the decision would have been the same, had the party, for whom the bank discounted the bill, been a stranger to them.

Agent.—An agent applied to a banking company on several occasions, to discount bills drawn by his principal, and, at the commencement of the transactions with them, informed them who the drawer and acceptors were of a bill, which he applied for discount of, and they agreed to discount it, without requiring the agent's indorsement. Several subsequent discounts took place under the same circumstances; but, upon some of the bills offered, they required and obtained, the agent's indorsement. The acceptances turned out to have been forged by the principal, of which fact the agent was wholly unaware.

The agent becomes bankrupt, and it is held, there being nothing to show that the agent had not handed over the proceeds of the bills to the principal, or that those proceeds could be recalled, that the banking house could not prove upon the bills, which the agent had not indorsed; (b) for although an agent may pledge his credit, so as to be liable upon a [*395] bill, though he do not indorse, (c) yet the mere fact, *of an agent, procuring a bill to be discounted for his principal, creates no liability on the agent's part. (d)

Manager of Bank.—A manager of a banking company has permission to carry on his separate trade; as a trader, he deals with the bank, on the terms usual between banker and customer, and being possessed of certain bills, in his character of trader, drawn and accepted by firms of

(a) *Sigourney v. Lloyd*, 8 B. & C. 622. Mr. Justice Story, (Bills, pp. 234, 235,) says expressly, "Every subsequent holder must receive the money subject to the original designated appropriation; and if he voluntarily assents to or aids in any other appropriation, it will be a wrongful conversion thereof, for which he will be held responsible." The objection to what the bankers did in *Sigourney v. Lloyd*, appears to be that they had paid A.'s debt to them with B.'s money. The decision was affirmed in *Exch. Ch. S. C.*, 5 Bing. 525; 3 Y. & Jerv. 220.

(b) *Ex parte Bird*, 4 De G. & S. 273; see *Gurney v. Womersley*, 4 E. & B. 133.

(c) *Jones v. Ryde*, 5 Taunt. 488.

(d) *Stead v. Thornton*, 3 B. & Ad. 357, n.

good reputed credit, he deposits them, without indorsing them, and obtains an advance upon them, his account, at the time, being already slightly overdrawn; therefore, this transaction was a loan, not a discount, and upon the subsequent bankruptcy of the drawers and acceptors, the manager was held bound to make good the loss to the bank.^(e)

Banker's Commission.—With regard to commission, it seems obvious, and has been expressly laid down, that a banker is as well entitled to his commission, for his trouble in transacting money negotiations, as a factor, for his trouble in effecting sales; commission is a lawful charge, provided it is reasonable and usual,^(f) this last fact being a question for the jury.^(g) Commission may also be charged for the trouble of obtaining acceptance, and payment of bills.^(h)

In all cases, where bankers make any charge by way of commission, for extra trouble or expense to which they may be put, in transacting business for a customer, it was considered, during the old laws against usury, to be advisable to separate the charges, for the trouble of keeping the accounts, from the charges of interest, &c., in the first instance, because it was said it will not be allowed to a *party, who has knowingly received anything as interest, afterwards to apply it to [396] another account, as he finds convenient.⁽ⁱ⁾

If a banker undertake to conduct any transaction, not in his ordinary mode of business, and stipulate for a certain charge to be made by him, in consideration of such extra trouble and expense independently of "all casts, charges, damages, and expenses that he may be put to by means of the premises," this was not considered as usurious; for, commission for trouble is not necessarily to be intended as a colourable reservation of further interest, beyond the legal interest, but as a compensation for trouble not comprehended within the words "costs, &c."^(k)

Thus, A., being indebted to his bankers, on the balance of his account with them, and having an agreement with a third party, for the purchase of growing timber, for 4,800*l.*, part to be paid for by A. at the time of the execution of the agreement, and part by bankers' acceptances, at different dates, assigned to the bankers this agreement, and all his interest therein, they undertaking to fulfil the agreement with respect to making the several payments, &c., as therein mentioned, upon the trust, in the first place, out of the proceeds which might, &c., arise, from the sale of the timber, to retain and repay themselves the said purchase money, then the amount due to them from A., on his account, together with interest at 5*l.* per cent., up to the time of payment, and also the further sum of 200*l.*, as and for a reasonable profit and compen-

(e) *Gwatkin v. Campbell*, 1 Jur. (N. S.) 131.

(f) *Curtis v. Livesey*, cited 4 M. & Selw. 197; *Ex parte Gwin*, 2 Deac. & C. 12; *Baynes v. Fry*, 15 Ves. 120; *Winch v. Fenn*, 2 T. R. 52, n.; see 17 & 18 Vict. c. 90; 17 Ves. 332.

(g) *Masterman v. Cowrie*, 3 Campb. 488; *Carstairs v. Stein*, 4 M. & Selw. 192; *Hammett v. Yea*, 1 B. & P. 144; see 11 M. & W. 333.

(h) *Baynes v. Fry*, 15 Ves. 120.

(i) *Per Ld. Kenyon*, C. J., 7 T. R. 185.

(k) *Palmer v. Baker*, 1 M. & Selw. 57; see now 17 & 18 Vict. c. 90, abolishing the whole system of laws against usury.

sation for the trouble they would be at in the present business, and also all costs, &c., (as above.) The bankers brought an action of trover against the sheriff, to recover the value of part of the timber seized by him, under a *fi. fa.*, issued at the suit of a creditor of A., and they had [*397] a verdict, which was upheld, *the court considering 200*l.* not more than an adequate compensation for trouble, and, therefore, the agreement not void for usury.(*k*)

Interest.—Where a *mortgage of land* is made by way of collateral security, for such balance as may eventually be due from the customer to his banker, it is no objection to charging the land with such balance, that it has been partly composed of interest, turned into principal by rests and interest on that interest, according to the course of dealing between a banker and his customers. In other words, the balance due is to be ascertained by reference to the course of dealing between the banker and customer, and having ascertained the amount, the only burden fastened on the land is this balance. Also, such balance was allowed to carry interest at 5*l.* per cent. per annum, but no more;(l) but now there is no objection, in the absence of fraud, to any rate of interest, which may be agreed on, for the stat. 17 & 18 Vict. c. 90, has abolished the *old* system of the usury laws.

And in a case which occurred long previously to the late changes in the usury laws, a custom of bankers in Liverpool, to strike a balance every quarter, and send the account to the merchant, and then to make that balance carry interest as principal for the next quarter, was held to be good, notwithstanding it was objected to as usurious.(*m*)

In the latest case on the subject, the facts were the following:—A customer gave to a bank a *mortgage on land*, for securing the balance due on the account. The bank having threatened a sale, the amount claimed by them was paid, upon an arrangement leaving open the question, what was the exact sum due to them on the balance of the [*398] account. *Differences arising as to this, A. obtains a decree in equity, for an account as between banker and customer. The account included charges for discounts, some at 5*l.* per cent., and some more;(n) also commission on the discount of bills, commission on dishonoured bills, and commission for trouble of keeping A.'s accounts. Upon a bill by A., to redeem the mortgage, it was held to be incompetent for him to object either to the charges for interest or commission as usurious, because a mortgagor impeaching a security for usury can only be relieved on paying what is justly due; and if the contract between him and the banker was to pay on a banker's account, as it seems it must be considered, then the meaning of that is an account, as usually kept between banker and customer.(o)

(*k*) See note (*k*), preceding page.

(*l*) Rufford v. Bishop, 5 Russ. 353; see Thomas v. Cooper, 2 Eq. R. 1192; and Lord Clancarty v. Latouche, 1 Ball. & B. 420, as to the mode of taking bankers' accounts.

(*m*) Caliot v. Walker, 2 Anstr. 495.

(*n*) See 3 & 4 Will. IV. c. 98, and 2 & 3 Vict. c. 37.

(*o*) Thomas v. Cooper, 3 Eq. Rep. 417, Lords Justices; see James v. Rice, 1 Kay, 231; Byles on Bills, 6th edit. 246.

*CHAPTER XIV.

[*399]

COUNTRY BANKS, AND BANK NOTES.

Most questions respecting country banks, and their bank notes, may be usefully considered together. It has been endeavoured to bring together the various points of the law on this subject, arranged with a view to purposes of practical banking, and to the elucidation of questions of actual occurrence.

A person, not a regular customer, paid into the Totnes Bank on March 18, a quantity of notes of a Dartmouth bank, purporting to amount to 800*l.*, which were received as a deposit of 800*l.*, to bear interest from that day, at 3*l.* per cent. per annum, to be withdrawn only after twenty days' notice, the interest to cease from the day of notice.

The course of business between the two banks was as follows:—Any notes of the Dartmouth Bank, received in the course of the day at the Totnes Bank, were by them transmitted, that evening, by the post, to Dartmouth, where the parcel would be delivered to the bankers the following morning; the Dartmouth Bank, in like manner, sent back each day the notes of the Totnes Bank, received in the course of that day, and if, on the evening of any one day, a balance appeared in favour of the Totnes Bank, the Dartmouth Bank paid to the London correspondents of the Totnes Bank the amount, by means of an order on their London correspondents, sent to them by letter the same evening; but if the balance was in favour of the Dartmouth Bank, and the Totnes Bank did not receive a sufficient quantity of notes, in the course of the next day, to meet that balance, the difference was ordered to be paid, *in London, by the London correspondents of the Totnes Bank, &c., by [*400] letter sent that evening.

On the morning of March 17, the accounts between the two banks exactly balanced, but on the evening, a parcel containing some of the Totnes Bank notes, and a cheque upon them, making together 340*l.*, was sent from the Dartmouth Bank. The parcel, arriving in the usual course of post, was not opened until the opening of the bank next morning, when the Totnes Bank became debtor to the Dartmouth Bank, to the extent of 340*l.*

On March 19, early in the morning, and before the usual hour of opening the bank, the parcel containing the above-mentioned Dartmouth Bank notes was received by the Dartmouth house, and *credit given* for it, to the Totnes bankers, in the account with them; also, before the opening of the bank. The bank stopped payment about half-past three on the same day.

In an action, by the depositor, against the Totnes bankers, it was decided that, at any rate, the plaintiff would be entitled to recover to the extent of 340*l.*; but, besides that, by the course of dealing, he was entitled to recover the whole, because the Dartmouth Bank, having given

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credit in account to the Totnes Bank, for the whole, must be taken to have paid the whole.(a)

A country bank consists of two partners, A. and B., one of whom, B., commits an act of bankruptcy, and becomes bankrupt, at a time when another bank in the country holds certain bank notes of theirs, payable at the house of R. & Co., the correspondents, in London, of the country bank first referred to. These notes were presented to R. & Co., for payment, but a part only was paid by R. & Co., out of the funds of A. and B., then in their hands, A. paying the residue, by indorsing to the country bankers a bill, given by a debtor to the firm of A. and B., for a [*401] larger amount, which they consented to take in payment, and *when due, it was paid to the latter bank, by the acceptors. Then A. commits an act of bankruptcy, and a joint commission issues, and the assignees claim from the second country bank the proceeds of the bill, and also the sum paid on the bank notes, by R. & Co., on the ground that the partnership having been dissolved by the act of bankruptcy of B., of which A. had notice, he was not competent to dispose of the partnership property.

The court held, that as A. had done no more than satisfy a claim, which was complete at the time of the bankruptcy of B., as he was warranted in doing, the action was premature, until an account had been taken in equity, and it was ascertained whether there was a balance against B., or not—that it was impossible to contend that a partnership, when one partner commits an act of bankruptcy, must immediately shut up the house—and that A.'s having acted in making the payment, with a knowledge of the act of bankruptcy of B., made no difference.

At the bar, and by the court, the discussion, as far as appears, was confined to the case of the payment on the *bill*, the payment on the *notes* being probably considered too clearly good, against the assignees, to bear argument, or require remark.(b)

The principle of this case,(c) which has been upheld in subsequent cases, is this:—A solvent partner, in a firm, even with notice of an act of bankruptcy committed by his partner, may satisfy a partnership creditor out of the joint funds in his (the solvent partner's) hands, provided the creditor's claim were already arrived at maturity at the date of the act; for, in such circumstances, the solvent partner is in the situation of a person winding up the partnership.

Accordingly, if one of two partners become bankrupt, and the solvent [*402] partner, considering the firm to be in a condition *to pay its debts, continues the business, and pays partnership money into a banker's, to be applied in discharge of running bills of the firm, made payable at the bank, and afterwards the solvent partner in turn become bankrupt, and his assignees, together with the assignees of the other partner, bring an action against the banker, to recover the money so paid, they will not be allowed to succeed. In other words, the banker may

(a) Gillard v. Wise, 5 B. & C. 134; see 2 A. & E. 36.

(b) Harvey v. Crickett, 5 Mau. & S. 335; see Collyer, Partnersh. 582, et seq.

(c) Harvey v. Crickett, 5 M. & Selw. 336.

safely receive such payments, applying the money in the mode specified, and is not liable over to the assignees, for the amount.^(d)

But all such cases must be free from ground for imputing fraudulent preference; if there be reasonable evidence of that in the transaction, the creditor will not be permitted to avail himself of partnership property, which may have been transferred to him by the solvent partner, after the bankruptcy of the other partner.

Thus, in a case which arose out of the bankruptcy of the country bank of H. & Co., just referred to, of which, as has been stated, Ramsbottom & Co., were the town correspondents. H. drew a bill upon Duck, for a valid consideration, which was duly accepted. The bill having been put into the hands of Ramsbottom & Co., afterwards got back into the hands of H. & Co., not having been negotiated by Ramsbottom & Co. H. & Co. applied to Ramsbottom & Co. for advances, which the latter agreed to make, but upon security. H. & Co. were ready to give securities, amongst which was the above bill. On May 17th, which was subsequent to the request of advances, but before the deposit of the bill as security, H. commits an act of bankruptcy; 23rd May, the bill was deposited with Ramsbottom & Co., as security for advances they had made. A separate commission of bankruptcy issued against H. Ramsbottom & Co. then brought an action as indorsees of the bill, against Duck, but ineffectually, the principal ground of non-suit *being, the knowledge of Ramsbottom & Co. of the [*403] bankruptcy of H., on the 23rd May.

The court, however, did not go so far as to say, that the creditor's knowledge of the bankruptcy of one partner is conclusive, to establish a fraudulent preference, in contemplation of the bankruptcy, of the other partner.

The decision only extends to laying down, that the facts stated state go far towards establishing a fraudulent preference.^(e)

Note payable Ten Days after Sight. A partnership, consisting of three persons, A., B. and C., carried on business as bankers, and received from a customer 250*l.* as a deposit, giving him in acknowledgment, a promissory note for that amount, payable ten days after sight, with interest at the rate of three per cent. per annum, "to the day of acceptance," and signed by A. only. This note bore date 13th November, 1813, the money having been deposited 23rd November, 1813. In 1819, A. retired from the firm, and was succeeded by D., who carried on the business with B. and C. till 1823, when B. died, and afterwards C. died insolvent. 14th May, 1825, the customer demanded payment of interest due on the note, and the same was paid up to November, 1824, by desire of A.; but D. told the customer at that time, that no more than two-and-a-half per cent. could be paid in future, and he, in the customer's presence, altered the note, by changing the three into two-and-a-half. In January, 1827, payment of the principal and interest

(d) Woodbridge v. Swann, 5 B. & Ad. 633; Ex parte Robinson, 1 Mont. & Ayr. 18, cor. Ld. Brougham, C.

(e) Ramsbottom v. Duck, reported 1 Montag. Partnersh. Appx. of notes, pp. 133-135. The power thus vested in the solvent partner over the partnership effects is personal to him. Fraser v. Kershaw, 25 L. J., Chanc. 445.

at three per cent., and also at two-and-a-half per cent. was demanded of A., and the following points were decided in an action by the customer against A. :—

1. The *acceptance* in this note meant *sight*, and that therefore the promissory note need not be left with the maker for *acceptance, [*404] in order to render him liable upon it, if it had not been altered, but that the alteration for the benefit of A. made it wholly invalid, as a security, between the parties.

2. The payment of interest was sufficient evidence to show a principal sum to be due.

3. The promissory note was admissible in evidence, to show on what terms the deposit had been made, although it was objected for A., that the note having been altered in a material part, with consent of the holder, ought to have had a fresh stamp, to render it admissible, (f) and the customer recovered upon the facts proved in evidence, and the count for money lent.

Bank Notes, when Money.—After what has been said, it is, perhaps, hardly necessary to state, that wherever country bank notes have once been treated, by the parties to a transaction, as money, no objection can afterwards be taken that they are not so *per se*.

For instance, if a stakeholder receives country bank notes as so much money, and afterwards pays them over wrongfully to the original staker, after he has lost the wager, he cannot object, in an action for money had and received, brought by the winner, to recover the amount won, that the notes are not money; (g) for, as they had been received as money, and treated as money by all parties, they must be so considered by the court. (h)

So, a person to whom a sum was payable under an agreement, having once received it in bank notes, without complaint or objection, cannot afterwards allege this not to be a payment under the agreement. (i)

Also, such action may be maintained for notes, by the *true [*405] owner, against a third person, into whose hands they have come *malâ fide*, provided their identity can be traced and ascertained. (k)

Still, it has been said, a banker stands in no different position from other persons, as to his own notes; if he sues for instance, for goods sold, the defendant could not support a plea of tender, by showing that he had offered the amount in the banker's own notes; he must have recourse to his set-off in respect of the notes. (l)

Bank notes, under some circumstances, will pass by a devise of "all my money, &c.," in a will. (m)

There is a distinction between Bank of England notes and country bank notes, in respect of bequests, &c.

(f) *Sutton v. Toomer*, 7 B. & C. 416.

(g) *Pickard v. Bankes*, 13 East, 20; see *Timmis v. Gibbins*, 21 L. J., Q. B. 403.

(h) *Fox v. Cudworth*, cited 12 J. B. Moo. 402; see *Lowndes v. Anderson*, 13 East, 130.

(i) *Shipton v. Casson*, 8 D. & Ry. 130.

(k) *Clarke v. Shee*, Cowp. 197.

(l) *Per Parke, B.*, *Foster v. Wilson*, 12 M. & W. 201.

(m) 1 Ves. Sen. 271, 273; compare *Stuart v. Marq. of Bute*, 11 Ves. 661.

Bank of England notes, unlike other choses in action, are capable of acquiring a locality; and were considered to be so, previously to their being made a legal tender, &c. So that they have always been held to pass in a will by a bequest of all the testator should have in his house at his death,⁽ⁿ⁾ or equivalent terms. But it is not so in case of country bank notes; any such notes that may be in the house would not pass under such words.^(o)

Bank of England notes pass as "goods and chattels," in a will:^(p) in general, choses in action do not pass by designation of "*the* goods and chattels," in a particular locality.^(q) Country bank notes do not pass under such designation.

Formerly, great particularity was required in statements in the memorials of annuities under the annuity acts, when *the consideration had passed not in actual cash, but in cheques on bankers,^(r) [*406] or in country bank notes;^(s) but these decisions have become unimportant, since the repeal of the laws prescribing enrolments of annuities, which was effected by 17 & 18 Vict. c. 90.

At Common Law, a tender in Bank of England notes of a debt has been held to be a good tender, if the creditor does not object to receive notes in payment.^(t)

The same is settled of provincial bankers' notes.^(u)

Bank of England notes, (before they were made a legal tender,) were held to pass in a will as cash, under the words "all that shall be in my house at my death."^(x) Bank notes, whether of the Bank of England, or of private banks, may now be taken in execution under *ieri facias*.^(y)

Bank of England notes pass by delivery as cash abroad, although by the law of the country in which the delivery is made, no property in the notes would be transferred by merely delivering it;^(z) for being promissory notes, payable to bearer, they are by force of the stat. 3 & 4 Anne, c. 9, transferable by delivery, wherever that delivery takes place.^(a)

The Bank of England may issue bank notes unstamped;^(b) it has the exclusive privilege of doing so within the city of London, and three miles thereof.^(c)

(n) Popham v. Lady Aylesbury, Ambl. 68; Brook v. Turner, 7 Sim. 671; see 11 Ves. 662; 7 Beav. 4, 9.

(o) Brook v. Turner, 7 Sim. 671. Cash, in a will, is a stricter term than money. Beales v. Crisford, 13 Sim. 592.

(p) Chapman v. Hart, 1 Ves. sen. 271.

(q) Hertford v. Lowther, 7 Beav. 1.

(r) See 2 Bro. & B. 19; 8 T. R. 328; Abbott v. Douglas, 1 C. B. 483.

(s) Morris v. Wall, 1 B. & P. 208; see Faircloth v. Gurney, 2 M. & Selw. 822; Doe d. Church v. Pontifex, 19 L. J., C. B. 145.

(t) Grigby v. Oakes, 2 Bos. & P. 526; Wright v. Reed, 3 T. R. 554; Anon., 1 Eq. Cas. Abr. 318, 319.

(u) Polglass v. Oliver, 2 Cro. & J. 15.

(x) Popham v. Lady Aylesbury, Ambl. 68. See as to country bank notes, Brooke v. Turner, 7 Sim. 671.

(y) 1 & 2 Vict. c. 110, s. 12.

(z) De la Chaumette v. Bank of England, 9 B. & C. 208.

(a) De la Chaumette v. Bank of England, 2 B. & Ad. 385.

(b) 7 & 8 Vict. c. 32, s. 7.

(c) 9 Geo. IV. c. 23, s. 1. Judicial notice is taken that the Bank of England is within the city of London. Partridge v. Bank of England, 9 Q. B. 414.

[*407] Banks of six, or fewer than six persons, provided they *were in existence as banks of issue before 6th May, 1844, may issue bills and notes, and promissory notes, payable to bearer on demand, on unstamped paper, except within the city of London, and three miles thereof.(c)

With respect to the form of bankers' notes, the stat. 55 Geo. III. c. 184, s. 18, prohibits, under a penalty of 50*l.*, any banker issuing any promissory note, payable to bearer, on demand, and liable to any of the stamp duties imposed by that act, *with the date printed therein*.

Before Bank of England notes were made a legal tender, as before stated, a country bank note in this form :—" Pontefract Bank, £5 : 5 : 0. I promise to pay to Bacon Frank, Esq., five guineas on demand, here in cash or Bank of England notes, &c.," was held not to be a promissory note within the statute of Anne, so as to render the maker liable to the holder. And so where bank notes were made payable to bearer on demand, with the same alternative.(d) Nor in case of bankruptcy, could he prove either on the notes, or for money had and received.(e)

A bank note, promising to pay at a particular place, must be presented at that place, in order to entitle the holder to payment from the bankers, unless they discharge the holder from such presentment and demand ;(f) in suing the bankers on the note, to aver that they became insolvent, &c., will not suffice to show a discharge, or dispensation with presentment and demand.(f)

Country bankers are not liable to an action, if they pay their notes, upon presentment, with Bank of England notes, so long as Bank of England notes are a legal tender every where, but by the Bank of England and its branches ; but they are liable, if they refuse to pay their own notes, otherwise than by other country bank notes, or if they insist on [*408] *paying by any other mode than in such money or currency as constitute a legal tender, in discharge of an ordinary debt.(g)

Two persons reside at Darlington ; one requests the other to give him change for a Sheffield Bank note, which the other does, on Saturday evening ; on Monday morning following, this bank opens for two hours, and then stops payment ; there was no evidence that the note had ever been presented for payment at the Bank, but the taker of the note on the Monday sent it back, desiring a return of his money, which was refused.

The court considered the person taking the note, in such circumstances, to be under an obligation to give prompt notice to the party from whom he took it, of the stoppage of the bank, and tender the note back to him, and that in this case he had done all that was necessary, in order to entitle him to recover the money he had given for the note ; although there had been no presentment at the banker's.(h)

Here, it might well be considered, that the tender of the bank note in return, seeing that it was the note of a bank situate at some distance from the place of residence of the parties, was made within a reasonable time for

(c) See note (c), preceding page.

(d) Ex parte Imeson, 2 Rose, 225.

(e) Ex parte Davison, Buck, R. 31.

(f) Bowes v. Howe, 5 Taunt. 30, Exch. Ch.

(g) Grigby v. Oakes, 2 B. & P. 526. This subject is more fully gone into under the head of *cheques*, supra, pp. 33-35.

(h) Turner v. Stones, 1 D. & L. 122.

presentment at the bank, and as the change was given for the note as a favour, it was wholly within the principle above submitted as holding in such cases; viz., that in such cases cash is always given, subject to the implied promise to return it in case, without laches of the receiver of the note, the bank stops payment before he has a reasonable opportunity⁽ⁱ⁾ for getting the money from the makers. To rule otherwise must throw upon the receiver the burden of incurring trouble *or expense, [*409] in taking or sending the note to be presented for payment at a distant place, without any corresponding advantage to him:—to imply a promise, without consideration, is what the law never does.

Bank notes are transferable, by delivery merely, and the person transferring is *not liable on the instrument*, there being no indorsement, to the transferee or taker.

Nor, as it appears, is he liable *on the consideration*, for which the bank note was given, if it turns out to be of no value in the transferee's hands, in consequence of the failure of the bankers, who issued and promised to pay it; for, by the delivery, without indorsement, there *prima facie*, has taken place a sale of the instrument; the one party hands over the goods, or whatever else formed the consideration, for paying over the instrument representing the value, or agreed price of the goods, &c., the other party hands over the note, the whole forming one transaction; and the law does not imply that he guarantees the solvency of the bankers.^(k)

Antecedent Debt.—If, however, a country banker's note, be handed over on account of a previously existing debt, the note is not considered as sold; therefore, if the note be presented in due time at the banker's, and the bankers having stopped payment, it is not paid, and due notice of the dishonour of it is given to the transferor, the transferee may have recourse to his original remedy for the antecedent debt; ^(l) for the creditor is entitled to cash, and if he takes notes, that is out of favour to the debtor, and it will be inferred, without there be evidence to the contrary, that the notes were agreed not to be payment, if they turn out to be of no value, *without laches in presenting, or other default of the taker. Perhaps this may be a sufficient ground to rest the ex- [*410] ception (if it is one) to the rule upon; but be that as it may, the exception seems to stand upon authority; though the rule is seemingly clear, that a banker's note, payable to bearer, on demand, delivered without indorsement, not in payment of a debt already due, but by way of a single transaction, as of exchange for goods, or for other notes, or for money, (in other words *changed*,) is sold to the party receiving it, who takes it with all risks, the transaction being *bona fide*.^(m)

(i) As to reasonable time, see *Appleton v. Sweetapple*, 3 Dougl. 137, 141; see also Co. Litt. 56; 2 Inst. 222; 1 T. R. 268; *Stratford v. Smith*, 1178, 1248. Form of deposition in proving against banking firm on their notes, 2 Flath. Arch. Bank. 44, 11th edit.

(h) See per Littleton, J., *Camidge v. Allenby*, 6 B. & C. 373; and see also *Rogers v. Langford*, 1 Cro. & M. 637; *Raphael v. Bank of England*, 25 L. J., C. B. 33; 10 Q. B. 713.

(l) *Camidge v. Allenby*, 6 B. & C. 373; *Ward v. Evans*, 2 Ld. Raym. 928; so 6 B. & C. 373; per Pratt, C. J., *Moore v. Warren*, *Stratford v. Smith*, 415; per King, C. J., *Holme v. Barry*, *Stratford v. Smith*, 415.

(m) *Fenn v. Harrison*, 3 T. R. 759; *Evans v. Whyte*, 5 Bing. 485; see 3 B. & C. 445, 446.

In either case, whether the bank note be taken at the time of the sale, &c., or for an antecedent debt, if the transferee can show fraud, as that the transferor knew the banker to be in a state of insolvency at the time, the former may recover from the latter.⁽ⁿ⁾

The proposition has lately been said not to be generally true, that when bank notes are paid, they are always paid at the risk of the party taking them, except where they are paid in respect of an antecedent debt;^(o) and there seems to be no doubt in the courts that, in ordinary cases, a person asking and receiving change for a bank note, which proves worthless, is bound to return the money, if the other party be not guilty of laches.

The situation of a banker who gives an accountable receipt, or credit in account, for so much money as a country bank deposited or paid in, promising to pay it, is that of a person who makes a promise, on a consideration, which must be taken as failing, when the notes turn out not to be available to realize the money which it purports to stand for, and on a representation, though not a warranty, of its being good for which, he takes it.

[*411] It is true that the accountable receipt, in the one case, or *the entry giving credit in account in the banker's book, on the other, would be *prima facie* evidence to show that *cash* was actually received by the bank, with whom the notes were deposited; but then this receipt is shown to have been given under a mistake of fact, when it is shown to have been given under the idea that the notes were as good as money, and the bank may always show this, and that no money was ever received by them.^(o) This is not a case where there was anything in the shape of a purchase of the notes.

However, the distinction has been laid down so often between taking bank notes in payment of an antecedent debt, which is not *ipso facto* extinguished,^(p) and taking them over a counter, or in immediate payment for a thing which passes at the time—that it is too much, it is submitted, to say that the general position can be shaken.

As has been noticed, when country bank notes are taken at the same time that goods, &c., are sold, or consideration of any sort passes, all in one uninterrupted transaction, the transferor of the bank notes is not considered as guaranteeing the solvency of the banking house that issues them, and the transferee takes them for better and for worse.

But although the transferor does not, in these circumstances, take the risk of the solvency of the makers of the notes, he does in all cases (except where there is an express agreement to the contrary, or, perhaps, circumstances from which a jury might infer an intention to the contrary) warrant the genuineness of the instrument, and must in all such cases bear the loss, if it turns out to be forged. Thus, where a banker discounts Navy Bills for A., and they turn out to be forged, though both parties be ignorant at the time of the discount, of anything being wrong,

(n) Per Bayley, J., *Camidge v. Allenby*, 6 B. & C. 373; see 10 Q. B. 713.

(o) *Timmis v. Gibbins*, 21 L. J., Q. B. 402.

(p) See the cases *supra*, and *Simpson v. Sikes*, 6 M. & Selw. 295.

the bankers may recover against A., and so they may, if they have received in payment bank notes which turn out to be forged.^(q)

**Presentment at Bank.*—It is not to be doubted, however, [*412] that the parties on every occasion of handing over bank notes, whether upon a consideration antecedent or concomitant, would certainly be bound by an express agreement providing for the case of insolvency of the maker of the notes; in either case, the party receiving the notes may stipulate—"I will not bear the loss, in case the banker has stopped payment within a reasonable time for presentment of them, and before they are paid." So in case of a person asking another to give him change for a bank note, it must be that the note must be inferred to be taken conditionally, that the taker shall not bear the loss,^(r) provided he does all that is necessary on his part, but not otherwise; therefore, he must present the notes within due time (or, perhaps, he may return to the person from whom he took, in due time,)^(s) in order to be discharged.^(t)

As to what is due time to present for payment a banker's note, after the receipt of it, various cases have been decided. The following are some of the principal of them:—A. sends his servant to a town, fourteen miles from his residence, to sell cattle; the servant sells them, and takes country bank notes in payment from B. (this was about one o'clock on Friday afternoon,) and paid them over to his master (who had been from home the whole of Friday) on settling with him on Saturday evening, A. presents the notes the following Monday morning at the banking house, when it is found that the bank had stopped payment on the previous Saturday, between three and four o'clock. Under these [*413] *circumstances, the court considered A. was entitled to recover from B. the amount of the notes, as A. had not been guilty of such laches, by not presenting the notes on Saturday morning, as made the notes his own, but intimated that the result would probably have been different if the servant had been identified with the master.^(u) It seems if the master had himself sold the cattle, and taken the notes for them, in one uninterrupted transaction, he would at once have made his election to take the notes as payment, according to the doctrine above stated, so that, independently of the question of laches, he must in that case, have borne the loss. The court, if the case is duly reported, do not seem to have had present to their minds the above-mentioned distinction between giving bank notes, in completion of a transaction of sale, and giving them in discharge of a precedent debt.

It is quite clear in general, that in case of a country bank note, made

(q) *Fuller v. Smith, Ry. & M.* 49; *Smith v. Mercer*, 6 *Tau.* 76; *Jones v. Ryde*, 1 *Marshall*, 157; *Bruce v. Bruce*, *id.* 165, distinguishable from *Price v. Neale*, 3 *Burr.* 1354, because the bill was paid by a person whose peculiar duty it was to see the bill was a good one; see *Bull. N. P.* 277; 1 *Salk.* 124.

(r) See *Van Wort v. Woolley*, 3 *B. & C.* 446, 447; *Timmis v. Gibbins*, 21 *L. J., Q. B.* 405.

(s) Per *Ld. Lyndhurst*, *C. B.*, 1 *Cro. & M.* 641, and *Cur.* 643.

(t) See *Rogers v. Langford*, 1 *Cro. & M.* 637; *Henderson v. Appleton*, cited *id.* 642.

(u) *James v. Houlditch*, 8 *Dowl. & R.* 3.

payable at the banking house, there must be a presentation for payment there, before a right of action can arise, *(r)* and merely alleging the insolvency of the house as a reason for nonpresentment is impertinent; nor will a declaration by the banker, that he will not pay his notes, dispense with presentment; *(y)* the note must be presented, and a demand of payment made at the banking house, unless the bankers discharge the holder from presentment and demand; *(y)* nor is it a sufficient excuse to say that the banker was from home, had absconded, and left no effects at the banking house. *(z)*

If bank notes be transferred in payment of a debt, and it turns out that, at the time of the transfer, though unknown to the creditor, the bankers had already stopped payment and were insolvent, and there was [*414] no presentment at the *banking-house, and demand of payment, on the one hand, but, instead, the taker, within a reasonable time, gave the party handing over the notes, notice of this fact, and offered to return them, which they refused, this is a sufficient foundation to entitle the transferee to recover in debt for the original consideration, for which the notes were transferred. *(a)*

The presentment, if made, must be in reasonable time; there must be no laches, otherwise the holder is considered as making his election thereby to take to the notes. *(b)* In cases between a holder of bank notes, and the party from whom he has received them (not being the makers,) it seems that to go through the form of presentment is always immaterial, after insolvency and stoppage by the bankers, provided that within a reasonable period—a period for this purpose may be reasonable, which, nevertheless, exceeds the time within which presentment ought to have been made—the transferee gave the other party notice that the notes were valueless, and offered to return them. *(c)*

There is, however, a distinction between the situation of a person with whom notes are deposited, and one to whom they are paid, in discharge of an antecedent debt, in the event of the notes being worthless: thus, if A. deposit notes of a country bank with another country bank, taking the accountable receipt of the latter for the sum represented by the notes, and it turns out that the notes are worthless, and the bank, as soon as they learn this, give notice to the depositor, and offer to return the notes, but are refused, neither the bank nor the depositor being aware at the time of the deposit, that the bankers, who made the notes, had then stopped payment; the depositor cannot have an action against the banking house with whom the notes were deposited, either for money [*415] lent, or money had *and received. *(d)* It was sought to be made out that the circumstance of the accountable receipt showed a

(z) *Saunderson v. Bowes*, 14 East, 500; *Dickenson v. Bowes*, 16 East, 110; see 3 Campb. 247.

(y) *Howe v. Bowes*, 5 Tau. 30; see 8 C. B. 759; 6 M. & Selw. 295.

(z) *Sands v. Clarke*, 8 C. B. 751.

(a) *Robson v. Oliver*, 10 Q. B. 704.

(b) *Camidge v. Allenby*, 6 B. & C. 373; see 10 Q. B. 713, 716; 16 M. & W. 232.

(c) *Per Erle, J.*, 10 Q. B. 717.

(d) *Timmis v. Gibbins*, 21 L. J., Q. B. 403.

treatment of the notes as money, but the court rejected that as a ground of decision.

Notice of Dishonour.—The same rule as to notice of dishonour of bills of exchange, and notice of dishonour of country bankers' notes, has always obtained; the rule is, it must be given, by the post which leaves on the day following that on which the holder gets information of the fact.

An illustration is afforded in the following circumstances.

A. being previously indebted to B. in 500*l.* on Friday, about eight or nine A.M., pays to B., at his residence, at Wantage, 490*l.* in notes of the Newbury Bank, and 10*l.* in a note of the Wantage Bank, B. giving him a receipt for 500*l.*, on the back of the promissory note, by which the loan had been secured.

B. immediately sends 450*l.* of the notes to his bankers at Wantage, with orders to transmit the Newbury Bank notes (which were made payable at the bank at Newbury, or at the bank of Messrs. Barnard, London, on demand) to London, to buy an exchequer bill. Wantage is distant from Newbury about eighteen miles, and was a two days' post from one place to the other: the post left Wantage for London at half-past five o'clock, P.M., every day, *except Saturdays*.

When B.'s messenger got to the bank, and delivered his message, with the above order, one of the partners said it would be dangerous to send the notes to London, and, therefore, declined or refused to send them by post that evening; but offered to inclose them on the Saturday evening, in their packet which they usually sent in the course of their business as bankers, two or three times a week, by the coach to London, and which packet he said, *would be in London on Monday. [*416] This was ultimately agreed to, and on Saturday evening 450*l.* of Newbury Bank notes were, by the bankers at the Wantage Bank, cut in halves, and one set of halves enclosed in their packet, and transmitted the same evening to London. They usually sent their notes half by the coach, and half by the post, and the other set of halves were sent by the post on Sunday evening, addressed to the London correspondents of the Wantage Bank; these halves reached them between ten and eleven A.M. on the Monday, and the packet, containing the other halves, was delivered to them somewhat later the same day.

The Newbury Bank stopped payment the same morning, but their correspondents in London, Messrs. Barnard & Co., continued to pay the Newbury notes the whole of Monday, but not afterwards, and the notes in question would have been paid if they had been presented in course of Monday. When they were presented to Barnard & Co. on Tuesday, they were dishonoured.

Notice of the stopping of the Newbury Bank being communicated to B., on the evening of Monday, he immediately sends a messenger to A.'s house, who states it to A.'s wife, A. himself having gone to bed; A., the same evening, said he would take notes again, and return them to the person from whom he had received them. He afterwards refused to take back the notes.

In an action, brought against him by B., it was held that B. was

entitled to recover, for that if the notes had been sent direct by the post to Newbury, they would not have been paid, as the bank stopped on Monday; and that sending the half notes to London was a reasonable precaution, and one which, therefore, the plaintiff had a right to adopt.^(e)

[*417] *Exchanging Notes.*—It is a custom among country bankers *who reside in the same district, to exchange each other's notes once or twice a week, something after the same plan as that adopted at the London clearing house.

This is a great convenience to all parties, and has the same effect as the practice with respect to the clearing house, in lessening the amount of bank notes or gold required for the circulation of the district; it also operates as a check to a redundancy of issues, by any particular bank, within the district.

The notes of such bankers as reside beyond the district, when they come into the hands of the bankers within the district, are not sent to the issuers of them, but are sent at once to London, for the purpose of presenting for payment to the bankers to whom they are addressed.

A mode is often adopted by country bankers, of making payments in London for a customer, by which they avoid stamp duty; that mode consists in advising their correspondents that a certain person will call on them for a certain sum, which sum is paid on demand by the London banker, to such person, on his signing a cheque for the amount; it being lawful for a person in London, to draw on a London banker at sight, without the cheque being subject to stamp duty.^(f)

Bankruptcy.—Where one of two country banks becomes bankrupt, each at that moment having in their hands bank notes of the other, which together with other securities, are reciprocally of nearly the same amount, and the assignee of the bankrupt house, knowing this, presents, and obtains payment of the notes, &c., of the solvent bank at their London agents, who are unaware of the relative situation of the two banks, the money was held to be recoverable by the solvent bankers from the assignee, it being shown, that on the balance of accounts between the [*418] bankers, not only was nothing owing *by the solvent bank, but there was a sum of 22*l.* in their favour.^(g)

Messrs. Forsters, bankers at Carlisle, had an agreement with Surtees, bankers at Newcastle-upon-Tyne, by which Forsters were weekly to transmit to the Newcastle Bank all the notes of the Newcastle Bank, and certain other specified banks, which they, Forsters, might have in their possession; and the Surtees were in exchange every week, to return to the Carlisle Bank; and any balance on one side or the other, was to be made up by that party drawing a bill on a banker in London, at twenty days, in favor of the other party, &c. On these facts, the bank notes so sent by Forsters, were held to constitute a debt from Surtees, to the Carlisle Bank, which Surtees might pay by a return of bank notes, under the agreement; but, if they made no such return, or a return short of the amount due, and gave no bill for the balance, such

(e) Williams v. Smith, 2 B. & A. 496.

(f) See Lawson's Hist. of Banking, 295, 296.

(g) Edwards v. Newman, 1 B. & C. 418.

balance was a debt against them, which was provable under a *fiat* against Surtees, on an act of bankruptcy committed after the time when the bill for the balance, if drawn, would have been due, and payable.^(h)

It was clearly laid down also, that the Carlisle bankers could not maintain an action against the Newcastle bankers, after the latter had got their certificates, to recover damages, as for a breach of contract, in not performing the above agreement.^(h)

The Newton Abbotts bank advanced to A. 500*l.* upon the security of his promissory note, payable on demand, with interest, and dated 7th November, 1840. 17th July, 1841, the bank stopped payment, at which time A. held bank notes, and interest notes of the bank, to the amount (with the interest due on the notes) of 581*l.* 5*s.*, being more than sufficient to have paid and discharged A.'s promissory note *and interest; in fact, he had collected such notes expressly for the [*419] purpose of taking up, and paying his promissory note with Newton Bank notes; and for these, he alleged, that he had given full value.

The bank subsequently without notice to A., deposited his promissory note, together with other securities, with Messrs. Williams, their correspondents in London, for the purpose of assuring the repayment of such sums of money as they might advance, &c., to the Newton Abbotts Bank, &c., and Williams & Co. held, on the whole, securities belonging to the Newton Abbotts Bank, to a greater amount than the balance due to them from the Newton Abbotts Bank.

Williams & Co. then compel A. to pay the amount of his promissory note and interest to them, and refuse to allow him to set off the notes of the Newton Abbotts Bank, which he holds.

A., in ignorance of the fact, that Williams & Co., hold securities to a greater amount than the balance due to them, as above stated, proves under the *fiat* for the bank notes which he holds.

The assignees of the Newton Abbotts bankers, then pay Williams & Co. what is due to them, after having credit for the sum paid by A. on the promissory note, and take from Williams & Co., all the remaining securities.

Now, as A. would have a right of set-off against the bankrupts, if he had continued in possession of the promissory note, he could not be deprived of that right by his ignorance of the state of accounts between Williams & Co., and the bankrupts, and so the court held the assignees to be bound, on his withdrawing his proof, to repay to him the amount of his promissory note, on his giving up Newton Abbotts Bank notes to the same amount.⁽ⁱ⁾

Proof.—With respect to proving on the bankruptcy, upon *the bank notes of the bankrupt, one or two points have been [*420] settled.

It has been questioned, whether a claim founded on notes of a country

(h) Forster v. Surtees, 12 East, 605.

(i) Ex parte Staddon, 3 M. D. & De G. 256; as to proving in bankruptcy on bank notes, see *supra*, p. 379, n. (a).

banker, payable on demand, when no demand has been made, would support a *fiat* against the bankers; but, at any rate, it seems clear, that when such notes were given in payment of an antecedent debt, the creditor may rely on that debt, if the notes be really worthless. *(k)*

A partner in a bank, who signs the bank notes "For A., B., &c." (stating *all* the names in the firm, and appending his signature,) cannot, on the bankruptcy of the partnership, be liable to proof against his separate estate, on such note. *(l)*

A person buying up bank notes of the firm, after its bankruptcy, cannot prove for them, unless he shows that the vendors of them were severally entitled to prove, in respect of the notes they sold; *(m)* but, a person owing a debt to a banking house may, even after they have actually stopped payment, buy up their bank notes, for the purpose of setting off their amount against his debt to them, not having at the time notice of an act of bankruptcy by either of the members of the firm; *(m)* but he could not set off notes, taken after he knew of an act of bankruptcy by *some* of the partners. *(n)*

One person may prove, on behalf of a large number of creditors, each holding notes of the bank, under similar circumstances with himself, provided that he does not attempt to interfere in the choice of assignees, or with the certificate; *(o)* but, these modes of proof are only allowed [*421] where necessity or consent is the foundation; Lord Eldon, in one **case*, required the proof to be made in the name of every one of 500 partners. *(p)*

Assignment of all Estate, &c.—Assignment of all their estate and effects, to trustees, for the benefit of creditors, by bankers, who were then in failing circumstances, and had stopped payment, is, although the assignment be made, merely for the purpose of constituting an act of bankruptcy, valid, as an act of bankruptcy, and it seems a *fiat* may issue on it, although the affidavit to found it be made previously to the date of the assignment. *(q)*

Lost Notes.—Questions sometimes arise, on occasion of the loss of bank notes, which are to be decided, it would seem, at first view, by reference to the principle—where a person has his option whether he will affirm an act, or contract, he must elect, either to affirm, or disaffirm it altogether; he cannot adopt such part of it as may be for his own benefit, and reject the rest; he may repudiate the idea of contract, for instance, and bring trover, treating the transaction as a tort in the entirety; but, if he treats it as a contract, and brings his action accordingly, then he must take that mode of viewing the matter, *cum onere*, and must admit the set-off of the defendant, if he has one. *(r)*

(k) Simpson v. Sikes, 6 M. & Selw. 295, 312.

(l) Ex parte Clarke, De G. Bank. R. 153.

(m) Ex parte Rogers, Buck, 490; so Ex parte Delawar, 3 Ir. Eq. R. 573; Burge on Suretyship, p. 445.

(n) Dickson v. Cass, 1 B. & Ad. 343; Hawkins v. Whitten, 10 B. & C. 217.

(o) Ex parte Gordon, 1 Mont. & A. 282; Ex parte Keys, 9 L. J., Chanc. 11.

(p) Ex parte Bank of England, 2 Gly. & J. 362; see Ex parte Child, 1 Atk. 111.

(q) Simpson v. Sikes, 6 M. & Selw. 295. As to notice of an act of bankruptcy by banker, Ex parte Halifax, 2 Mont. D. & D. 544.

(r) Smith v. Hodson, 4 T. R. 211.

An action of trover was brought by the owner of a lost bank note, under the following circumstances:—The owner's clerk lost the note, a woman found it in the street; she requested the defendant's son to take it to the bank, and he, by the defendant's directions, got change for it. The note was for 20*l.*; twenty sovereigns were given in change. Of these, eighteen were given back to the woman, who was afterwards taken before a magistrate, and seven sovereigns, *part of the eighteen, found upon her, and given back to the owner of the note. He [*422] sued the defendant for the remaining 13*l.*, and the jury found a verdict for 13*l.*; and it was moved to enter a nonsuit, on the ground that by taking back the seven sovereigns, the plaintiff had treated the transaction as a matter of contract between him and the woman, there was an adoption and ratification of what she had done; but it was held, not to operate so, but only to go in mitigation of damages.(s)

If bank notes are lost, the finder acquires no property so as either, to enable him to defend an action of trover against the true owner, or to sue the makers. Still, as such instruments pass by delivery, any one to whom the finder transfers the note, provided such transferee takes it without fraud, may do both; he may retain the note against the loser, and he may compel payment from the maker.(t)

If a bank note be lost, or stolen out of a letter put into the post-office, no action lies to recover it or its value at the suit of the loser, against the Postmaster-General.(u)

On the trial of an indictment for forgery, the loss of the bank note alleged to have been forged, is not necessarily a bar to conviction; thus, where a prisoner swallowed the bank note that he was indicted for having forged, it was held, that he might have been convicted without the production of the bank note;(x) it seems, however, that the owner of a *destroyed* bank note could not recover in a civil action against the makers; or at least, it may be said to be a question not wholly without doubt,(y) and he was practically obliged to have recourse to a court of equity, in most instances; but now it is enacted, with respect to all negotiable instruments, to be "lawful for the court, or a judge, in actions [*423] *founded thereon, to order that the loss shall not be set up, provided an indemnity is given against the claims of any other person upon it."(z)

Also, if part of a note was lost, it was the rule, apparently, not to allow the owner of the other half to recover, if he could not either produce an entire bank note, or prove that the other half had been actually destroyed;(a) but the new statute will be equally applicable in this case, if indeed, it would not now, independently altogether, be a good defence for the bankers to show, that they had paid the amount once to the original owner of the whole note, upon his presentment of his half; for

(s) *Burn v. Morris*, 4 Tyrw. 486.

(t) *Byles on Bills*, 297, 6th edit.

(u) *Whitfield v. Lord Le Despencer*, Cowp. 754.

(x) *Anon. cor. Buller, J.*, cited 2 Campb. 211.

(y) Compare *Hansard v. Robinson*, 7 B. & C. 90, with *Woodford v. Whiteley*, Moo. & M. 517; *Wain v. Bailey*, 10 A. & E. 616.

(z) 17 & 18 Vict. c. 125, s. 87; see 24 L. J., *Chanc.* 624.

(a) *Mayor v. Johnson*, 3 Campb. 324.

although the holder of the lost half might show, that it came to his possession bona fide, still it is said, that the taker of a half note necessarily takes under suspicious circumstances, and he is not bound to take the half note at all; he ought to bear the loss, it seems.(b)

Bank of England notes cannot be followed by the legal owner into the hands of a bona fide holder, for good consideration, without notice;(c) and the holder of a Bank of England note is, *prima facie*, entitled to prompt payment of it, and cannot be affected by the previous fraud of any former holder in obtaining it, and therefore the payment cannot be refused, when it is presented, unless the bank can show that he was privy to that fraud.(d)

If A. pays a bank note to B., who pays it, in discharge of a debt, to C., who presents it at the Bank of England, where it is stopped, on the ground that it has been fraudulently obtained; and then A. pays the amount to C., in consideration that his debt, due from B., had not been [*424] discharged, *partly through his (A.'s) means; still A. cannot recover, in trover, against the Bank of England.(e) The stopping payment does not appear to be a duty, but is merely an accommodation rendered to the public.

A money-changer, changing a Bank of England note, which had been stolen, but giving full value for it, taking it bona fide, not having, at the time, knowledge that it had been stolen, is entitled to recover from the Bank the amount of the note, although he had the means of knowledge, if he had taken proper care of certain notices, which had been previously delivered to him.

In this case, the money-changer carried on business in Paris; change was given by him, for the note there; and he had received, some time before, a printed advertisement, stating this note, among others, to have been stolen from Messrs. A., in England; the note was changed about the middle of the year next following that in the course of which he had received the notice.(f)

If the owner of a banker's note, which has been lost, or stolen, stop the payment, on that ground, and then demand that the amount shall be paid to him, the banker has a right to require surety, or indemnity, against the demands of any future bearer, who may present for payment before he pays the true owner; for the banker would not be able to dispute the right of any future bearer, who came fairly by the note, to payment, and, therefore, he is entitled to be indemnified against the contin-

(b) See Byles on Bills, 379, 6th edit.

(c) *Lowdes v. Anderson*, 13 East, 139; S. C., 1 Rose, 199. A., taking for good consideration, and bona fide, from B., is entitled, though B. has stolen the note, *Miller v. Race*, 1 Burr. 452, which was trover against the clerk to whom the note was presented for payment.

(d) *Solomons v. Bank of England*, 13 East, 135, n.; see 1 Burr. 452; Cowp. 197, 200; 10 A. & E. 784.

(e) *Benjamin v. Bank of England*, 3 Campb. 417. The bank is in the practice of stopping the payment of a note that it has notice has been stolen, upon receiving an indemnity from the applicant, and this has been declared to be a reasonable practice. *Miller v. Race*, 1 Burr. 460; see 4 A. & E. 36.

(f) *Raphael v. Bank of England*, 25 L. J., C. B. 33; compare *Solomons v. Bank of England*, 13 East, 135; and S. C., 3 Bing. 418.

gency of the note being presented by such a bearer;(*g*) and this seems to be a direct consequence of the law as laid down in a late case, where the holder of a *stolen Bank of England note for 500*l.*, who took it in Paris, bona fide, and for full value, was held entitled to recover, even though he took it in circumstances showing negligence;(*h*) for if such holder has a right to receive from the banker the amount of the note, to lay down that the banker is bound to pay the amount to the true owner, in the first instance, would be to expose him to very serious risk of being obliged to pay the amount twice over.

Now, as nothing that has been done, or omitted, by the true owner, or by the innocent holder for value, can make it just that the banker should incur any liability greater than that which he contemplated in making the note, viz., to be bound to pay the amount of it, the question, as between the original owner and innocent holder, for value, must be decided by reference to the rule:—where one of two innocent parties must bear a loss, that loss is to fall on the party who has, by his conduct, given rise to it; and this is the party who has allowed the note to be lost or stolen from him; or, if it be said, the loss, or theft, was an accident, beyond his control, and such an event as no human foresight could provide against, or prevent, still there is no reason, that a party who has no share in causing an accident, should be made to suffer, or to repair, the consequences of it.(*i*)

To support an action, by owner of lost bank notes, against persons who have got them into their hands, without giving value, it is not absolutely necessary for the plaintiff to give direct evidence of the loss; if such circumstances are shown as to satisfy a jury of the fact of the loss, that is sufficient.(*k*)

A notice of the loss of bank notes is not to be considered as of perpetual force; and, unless such notice be renewed, it will be a question for the jury, in an action, by the owner, *to recover the lost notes, whether, if the party heard no more of the matter for a [*426] year, or more, he might not fairly infer that the notes had been recovered.(*l*)

It is very important, however, in case of loss of bank notes, to bear in mind the general principle: if a person find lost property, and keep it, having, at the time of finding it, no means of discovering the owner; he is not guilty of larceny, because he afterwards has means of finding the owner, and, nevertheless, retains the property to his own use.(*m*)

If the finder had seen the notes drop from the owner's pocket; or, if the notes had had the name of the owner written upon them; or, if there had been other similar circumstances, to enable the finder to know who was the owner, at the moment he picked up the notes, that would have been different.(*m*)

(*g*) *Walmesley v. Child*, 3 Burr. 1524, cited.

(*h*) *Raphael v. Bank of England*, 25 L. J., C. B. 33; see *Shee v. Clarke*, Cowp. 200, acc.

(*i*) See per Lord Mansfield, C. J. 3 Burr. 1525, per Wilmot, J., id. 1526.

(*k*) *Holiday v. Sigil*, 2 Car. & P. 176. (*l*) *Suow v. Leatham*, 2 Car. & P. 314.

(*m*) *Reg. v. Dixon*, 25 L. J., Mag. Cas. 39, where bank notes were amongst the lost property, and the finder had changed them.

Even if a finder instantly appropriate the note, *animo furandi*, but under such circumstances as to warrant a jury in finding, that, at the time of the appropriation, he really believed that the owner could neither find the note nor be found himself, such appropriation is not larceny; ⁽ⁿ⁾ but the jury must not be left to speculate as to what was in the finder's mind, at the moment, without any evidence for them to build a conclusion upon. ^(o)

In case of a note being marked, or inscribed, so that the real owner might be found, it seems, there must be proof that the prisoner can read these marks, &c., before he can be convicted, ^(p) or that he got them read to him.

Old Rule.—Under the law, as formerly understood, it was considered, [*427] that the rights of the transferee might be *affected by the degree of caution that he used in taking the note. Thus the following cases were decided:—

The porter of a banking house has stolen from him a 30*l.* Bank of England note, as he is passing with it, in his pocket, on an errand of his master's; they duly advertize the loss, and, after some delay, trace the bank note to the possession of a horse dealer; the banking house suing him in trover, to recover the note, or its value, it was left doubtful, on the evidence, whether he had admitted receiving it from his bankers, or from a stranger, at Doncaster races, for bets won; but, at any rate, it appeared, that he had made no inquiry, and not taken the number of the note; and the jury having found a verdict for the bankers, the court granted a new trial. ^(q)

A person was robbed, 23rd December, 1825, of his pocket-book, containing a bill of exchange, drawn by bankers, at Canterbury, on, and accepted by bankers in London, dated 21st November, 1825, payable thirty days after sight; on 26th December he advertised his loss, stating, in the advertisement, the contents of the pocket book to be of no use to any but the owner; 30th December, he gave notice to the acceptors, and requested them to stop the bill; 29th December the bill was presented at the Maidstone Bank, by a stranger, who said he was son of the indorser, and the amount was thereupon paid in the bank notes of that bank. In an action, by the loser, against the Maidstone Bankers, it was held, that the proper questions, for the jury, were, whether the plaintiff had used due diligence in making public his loss; and whether the bankers had acted with good faith, and proper caution, in cashing the bill. ^(r)

⁽ⁿ⁾ Reg. v. Thurborn, 1 Den. C. C. 388, 395, 396.

^(o) Per Jervis, C. J., 25 L. J., M. C. 40; what proper direction to jury, Reg. v. Preston, 2 Den. C. C. 353.

^(p) Per Alderson, B., 2 Den. C. C. 358.

^(q) Snow v. Saddler, 3 Bing. 610. In another case, where the porter of the same bank was robbed of a 500*l.* Bank of England note, and it was cashed at a branch bank, situate at an obscure place, called Bourne, in Lincolnshire, of the defendant's bank, at Sleaford; and that without asking any questions of the person presenting the bill, and who was a stranger, it was held that the Sleaford bankers were liable, due advertisement having been made. Snow v. Peacock, 3 Bing. 406.

^(r) Beckwith v Corral, 3 Bing. 444.

*So, where the plaintiff left in a hackney coach, and lost a bank post bill for 100*l.*, and dispersed among the hackney coach stands, &c., hand-bills, describing and offering a reward, &c., and also advertised in the Morning Advertiser of the 24th September, about eight days after her loss, and early on that day a stranger presented the bill at a banking house at Brighton, and, on being asked his name, said he was going a journey, and wrote on the bill, in a very illiterate hand, a name and address, and the banker, not having heard of the loss, cashed the bill, taking the usual commission; the question being left to the jury, nearly as above stated, and a verdict found for the plaintiff, the court held the banker to be liable.^(t)

Present Rule.—But the law has lately been laid down in different terms, and the courts have shown a desire to retrace some of the steps that led to these decisions. Even gross negligence in taking would now, not be of itself, a reason why a taker for value should suffer. Thus, where six Bank of England notes, for 500*l.* each, were stolen in November, 1852, from Brown & Co., in Liverpool, who immediately published notices of the robbery, and of the numbers of the notes, in the French and English languages, and circulated them in England, France, and other countries; fresh notices to the same effect, being published in April, 1853; one of these last notices was left in due course, in 1853, at the place of business of one St. Paul, a money changer in Paris. In June, 1854, a stranger entered the shop, and asked what was the exchange of the day, and produced a 500*l.* Bank of England note; the file of notices, kept in the shop, was not looked at; but the stranger was asked to write his name, and to produce his passport, and St. Paul finding the name so written, and that in the passport, to agree, gave change for the note, at the current rate of exchange; St. Paul then remitted the note to his correspondent in London, who presented it at the *Bank of England, and was refused payment, but the bank was held to be bound to pay, on the ground that a party taking a negotiable instrument bona fide, and for full value, is entitled to recover on it, although it has been stolen, and he took it negligently.^(u)

Forgery.—As regards the forgery and passing of bank notes, knowing them to be forged, it is enacted by 11 Geo. IV. & 1 W. IV. c. 66, s. 3, that if any person shall forge or alter, or shall offer, utter, or dispose of, or put off, knowing the same to be forged or altered, (amongst other instruments,) any note, or bill of exchange, of the Governor and Company of the Bank of England, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any indorsement on, or assignment of, any bank note, bill of exchange,^(x) or bank post bill, or any bill of exchange, or any promissory note for the payment of money, or any indorsement on, or assignment of, any bill of exchange, or promissory note for

^(t) *Strange v. Wigney*, 6 Bing. 677.

^(u) *Raphael v. Bank of England*, 25 L. J., C. B. 33; *Bank of Bengal v. McCleod*, 7 Moo. P. C. 35; *Ex parte Bushell*, 3 M. D. & De G. 658, overruling *Gill v. Cubitt*, 3 B. & C. 466; and *Down v. Halling*, 4 B. & C. 330; see *Miller v. Race*, 1 Burr. 452; *Walmesley v. Child*, 3 Burr. 1524.

^(x) See *Johnson v. Windle*, 3 Bing. N. C. 225.

the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, with interest, in any of the cases aforesaid, to defraud any person whatsoever, (y) every such offender shall be guilty of felony, &c. (z)

Under an indictment for uttering, it may be proved that the prisoner offered, or tendered, the note in payment, or that he actually passed it, or otherwise disposed of it to another person. (a)

A *conditional* uttering has the criminal qualities of any other uttering; thus, where the defendant gave a forged *acceptance, knowing [*430] it to be so, to the manager of a bank, where he kept an account, saying he hoped this bill would satisfy the bank, as a security, for the balance he owed them; this was holden a sufficient guilty uttering. (b)

In indicting for offering and disposing of the note, &c., it is not necessary to allege to whom it was offered. (c)

When the authority of a banking company, to draw and issue notes, is recognized by statute, it is not necessary to prove it by the charter or otherwise. (d)

On an indictment for disposing and putting away forged bank notes, knowing them to be forged, the prosecutor has a right to give in evidence the fact of other forged notes having been uttered by the prisoner, for the purpose of proving his knowledge of the notes in question being forged also; (e) and delivering to another person a forged bank note, to be put off or passed by the latter, is a "disposing and putting away," within the statute. (f)

Formerly, such an indictment could not have been maintained on a bank note, promising to pay in cash, or Bank of England notes. (g)

In case of forgery of an order for payment of money, made on bankers, the instrument may be described in the indictment, as a *warrant and order*. (h) So, an instrument, payable to the order of A., and directed "At Messrs. P. & Co., bankers," is properly described as a bill of exchange. (i) Forging a bill upon a bank, payable to prisoner's own order, and uttering it without indorsement, has been held to be a complete offence. (j)

*As regards larceny, it has been decided, with respect to bank [*431] notes, that a person employing another to purchase exchequer bills for him, and giving him a cheque on his bankers for the amount, which the person employed received in bank notes, and then absconded,

(y) "To defraud" generally is sufficient, 14 & 15 Viet. c. 100, s. 8.

(z) For form of indictment, &c., see Archbp. Crim. Plead. and Evid. by Welsby, 12th edit., p. 459.

(a) R. v. Holden, 2 Taunt. 334.

(b) Reg. v. Cooke, 8 Car. & P. 582; see Reg. v. Welch, 2 Den. C. C. 78.

(c) R. v. Holden, 2 Taunt. 334.

(d) R. v. McKeay, 1 Mood. C. C. 130.

(e) R. v. Wylie, 1 N. R. 92.

(f) R. v. Palmer, 1 N. R. 96; see Reg. v. Lee, 2 M. & Rob. 281.

(g) 2 Russ. Cri. & M. 497, 3rd edit.

(h) R. v. Crowther, 2 Russ. Cri. & M. 386, 3rd edit.; Reg. v. Thorn, Car. & M. 206; Reg. v. Gilchrist, Car. & M. 224; see Reg. v. Vivian, 1 Den. C. C. 35; Reg. v. Carter, 1 Den. C. C. 65.

(i) Reg. v. Smith, 1 C. & K. 703.

(j) 2 Russ. Cri. & M. 501, 502, 3rd edit.

cannot indict the offender for larceny, because the prosecutor never had possession, except by the defendant.^(k)

If a person gives forged country bank notes in payment for goods, and, when the seller objects to receive them, assures him they are good, knowing them, at the time, to be valueless, he is indictable for cheating and defrauding the seller out of the goods; but the evidence, to show the notes to be bad and worthless, must be clear and full. In a case where there was some evidence, to show that the bank, of which the paper in question purported to be the notes, had stopped seven years previously; and the notes appeared to have been exhibited under a commission of bankrupt against that bank; the words, importing the memorandum of exhibit, had been attempted to be obliterated, but the name, of the commissioners remained on each of them: it further appeared, that the notes had never been presented for payment at the bank, or at Sir J. Esdaile's, in London, where they were made payable; the judges held the evidence insufficient to convict the prisoner, as failing to prove the notes to be bad.^(l)

So, it is not sufficient to show the bankruptcy of two, out of three, partners in a bank, and the shutting up of the house; for the third, being solvent, the note, if presented to him, may, perhaps, be paid.^(m) So, even where the bank had ceased business twenty years before, and the note, uttered *by the prisoner, was old, discoloured, and dated many years before the time of giving it, and was regularly [*492] cancelled, and withdrawn from circulation, the makers having traced a large cross over the face of it; but the proceedings in bankruptcy, against the bankers, were not produced; the prisoner, though he gave a false address, when asked, it was considered, could not be convicted of a false pretence, within the statute, as there was no evidence to go to the jury, of the prisoner knowing the note to be cancelled, and unavailable, at the time he uttered it.⁽ⁿ⁾ Neither is this shown, upon this evidence, to be a cheat at common law.⁽ⁿ⁾

In these cases, the prisoners, respectively, alleged and insisted, that the notes they presented, as payment, were good notes; but an actual representation is not necessary; for conduct may be equipollent, without words.^(o)

Bank Post Bills.—Questions often arise respecting bank post bills, in the course of the business of country banks; we shall, therefore, devote a word or two to that subject.

From what has been formerly decided, it seems indisputable, that giving cash for a bank post bill is “a payment,” within the protection

(k) R. v. Walsh, R. & Ry. 218. Stealing bank notes out of an envelope, Reg. v. Glass, 2 Den. C. C. 215. Larceny in cashing a cheque, Reg. v. Johnson, 2 Den. C. C. 310. Larceny as to changing bank notes, R. v. Oliver, 4 Taunt. 274; 2 Leach, 1072; see Reg. v. Rodway, 9 Car. & P. 984.

(l) R. v. Flint, Russ. & R. 460.

(m) R. v. Spenser, 3 Car. & P. 420.

(n) Reg. v. Clark, 2 Russ. Cri. & M. 296, n.

(o) R. v. Freeth, 2 Russ. Cri. & M. 295; R. v. Story, id. 291, 292, 293, case of a money order.

of the Bankrupt Act, *(p)* provided it is really, and bona fide, made to the bankrupt before date of the *fiat*, or the filing of a petition for adjudication of bankruptcy.

Therefore, in case a trader commits an act of bankruptcy, and absconds, carrying with him bank post bills, drawn in London, *accepted by the bank*, and made payable to himself, and presents them, indorsed, to the Bank of England, (when indorsed did not exactly appear,) at a Branch Bank of the Bank of England, requesting to have gold for them, [*433] *which is given him, and the *fiat* has not then issued, and the act of bankruptcy is unknown to the manager of the Branch Bank, then the giving change for the bills, whether considered as a purchase of them, or a payment, in discharge of the liability of the bank, as acceptors, is only valid if it is protected as a *payment* under the Bankrupt Act. Where the bankrupt absconded, from Liverpool, March 12; application to stop payment, was made to the bank, in London, March 16, and the same was repeated, April 8, and the bills were changed at the Branch Bank, at Gloucester, April 12. This was held not to be a protected payment, as the Bank of England had sufficient notice. *(q)*

As to proving the deeds of the Bank of England, it was held, in one case, where the seal of the bank was affixed to an indenture, by a piece of paper, wafered to the indenture, on which was written, "Sealed, by order of the Court of Directors of the Governor and Company of the Bank of England, 12th December, 1833, J. Knight, secretary," that J. Knight was not an attesting witness, so as to make it necessary to call him, and that the execution might be proved by the seal. *(r)*

Remittances.—As regards questions respecting the transmission of money by the intervention of bankers, from one part of England to another, many points have been noticed, arising in cases which have been referred to principally for other purposes, and will be found in parts of the work, where discounts, commission, and the relations between banks in one town, and their branches, or correspondents in London, or elsewhere, are stated.

Foreign.—With respect to the transmission of money, between England and foreign countries, some decisions have *been made, [*434] which it may be desirable to bring separately before the reader's notice, especially as regards the subject of the course of exchange. If A., in Paris, deposits money in the banking house of B. there, for which B. gives him his promissory note, allowing three per cent. interest, and made "payable in Paris, or at the choice of the bearer, at the Union Bank, at Dover, or at my usual residence in London, according to the course of exchange upon Paris." B., previous to the first French Revolution, and for some time subsequently to its outbreak, kept a banking

(p) 12 & 13 Vict. c. 106, s. 133; *Willis v. Bank of England*, 4 A. & E. 21. Form of bank post bill, *id.* 22, n. Entry in bank books of application to stop payment, *id.* 22.

(q) *Willis v. Bank of England*, 4 A. & E. 21. Bank post bills, issued in London, are not payable at the branch banks in the country, i. e., the bank is not bound to pay them there, S. C., *id.* 38.

(r) *Doc d. Bank of England v. Chambers*, 4 A. & E. 410.

house in Paris, into which travellers, at that time, were accustomed to pay money, which they wished to be transmitted home, and took promissory notes similar in form to this. At the time when the note in question was delivered to A., viz., 20th May, 1791, there was a direct course of exchange between London and Paris. In October, 1793, the exchange between London and Paris ceased altogether. On 20th May, 1799, when the note was presented for payment in London, there was no direct course of exchange between them, but there was, and continued to be at the time of the bringing of the under-mentioned action by A., a circuitous (though the shortest available) course of exchange between London and Paris, through Hamburg, and A. sued on the note, to recover from B. the value of the money he had paid, in Paris, according to this circuitous course of exchange, together with interest, and the question was, whether he was entitled to this value, or the value that it would have been of, according to the rate of the latest direct course of exchange, being 59*l.* 3*s.* 4*d.* in one case, and 18*l.* 16*s.* 6*d.* in the other, and it decided that he was entitled to the former sum, notwithstanding that neither of the parties at the time of making the contract contemplated the interruption in the exchanges, which the war produced.^(s)

No objection was made in this case, nor in several others, [*435] *which have subsequently occurred, that the statute of Anne, which gave to promissory notes a negotiable character, &c., does not extend to notes made out of England;^(t) and, in an action by a joint stock banking company, on a promissory note made by one L., in Scotland, against the indorser to them, it was considered as an inland bill of exchange, of which, therefore, protest for payment was not necessary, and the company recovered, although it was not shown that they had duly delivered at the stamp-office, the return required by statute 7 Geo. IV. c. 67.^(u)

A., in London, draws a bill on B., in Paris, which, having been negotiated through Amsterdam, is presented for acceptance to B., who refuses to accept, but promises that the bill shall be paid at maturity. Before, however, the bill is due, the French Government prohibits the payment of any bills drawn in countries at war with France, which Great Britain was, and on that, the bill was not paid by B. Under these circumstances, A. is liable to the payees, not merely for the whole value, that he originally received for the bills, with interest, and the expenses of protecting, but for the amount of the re-exchange, by the circuitous course of Amsterdam, that being a consequence of the bill not being paid.^(x)

^(s) Pollard v. Herries, 3 B. & P. 335. As to legality of promissory notes made abroad, see Chitt. Bills, 327, 6th edit.

^(t) 3 & 4 Anne, c. 9. See Hewett v. Morris, 3 Campb. 303, case of a promissory note made in Paris; Roche v. Campbell, 3 Campb. 247, note made in Ireland; Splitgerber v. Kolm, 1 Stark. 125, note made in Prussia; Carr v. Shaw, Bayl. Bills, 18, n. (1); Chitt. Bills, 327, 6th edit., note made at Philadelphia.

^(u) Bonar v. Mitchell, 5 Exch. 415. 39 Geo. III. c. 107, and 12 Geo. III. c. 72, appear to recognize promissory notes made in Scotland. As to presentment of promissory note made in Belgium, see Vanderdonckt v. Thellusson, 8 C. B. 812.

^(x) Mellish v. Simeon, 2 H. Bla. 378; and see De Tastet v. Baring, 11 East, 265.

If a bill of exchange be drawn in England, on and accepted by a firm, carrying on business in Paris, payable at Paris, to A., who indorses to bankers in London, it may be asked, is this a foreign bill; and when dishonoured by the acceptors in Paris, and protest and notice of dishonour, sufficient, *according to French law, has been given, is [*436] this enough to charge A. in an action in England, by the bankers, although such protest, and notice of dishonour, were insufficient, according to English law. The Court of Queen's Bench has held, that it is so, (y) but this decision has not been approved.

Home.—An agent of a Durham Bank, residing at Hexham, receives 50*l.* from a person also residing there, to be transmitted to London; for this purpose, he fills up, and signs a printed form of bill, requiring the firm in London, (both houses consisting of the same partners,) to pay 50*l.* at forty days' after date; the agent was known to the other, to be an agent of the Durham Bank, and to draw the bill, as agent, and on account of the Durham Bank, and in the body of the bill, the London houses were desired to place the sum "to the account of the Durham Bank." The bill, when due, was presented in London, but refused payment; and when the depositor sued the agent, he was held to be personally responsible, on the universal rule, that whoever puts his name to a bill of exchange, thereby makes himself personally liable, unless he states, on the face of the bill, that he subscribes *for* another, or by procuration of another: the agent, therefore, was liable, notwithstanding the depositor's knowledge, that he was a mere agent: and whether, or not, the Durham Bank was liable, made no difference, as regards the agent's liability. (z)

Where a debtor remits to his creditor, a bank note, or bill of exchange, by a mode of conveyance directed by the creditor; or, if he transmits by the post, as being the usual mode of transmission, in the absence of [*437] orders from the *creditor, prescribing the mode, and the bill, or note, be lost, or stolen, the loss falls upon the creditor. (a)

A parcel made up by a banking house, sealed, and addressed to another banking house, containing cash, notes, and cheques of the latter, and bills of exchange, specially indorsed to the former, to make up a balance, due from them, on their general account, and deposited on the 3rd of July, after the bank was shut, with a woman servant, left in care of the banking house, to be given to the postman, in the morning of the 4th, who was in the habit of calling for such parcels, before banking hours. Held to be seizable, under an extent in aid, tested on the 2nd July, and returnable on the 6th November, on special demurrer, to a plea, stating those facts, and tendering issue on the property; and that, although the inquisition, finding the debt due to the debtor of the crown debtor, was not taken till the 4th November following, because such circumstances do not amount to a delivery of the parcel, to the persons to whom it was

(y) *Rothschild v. Currie*, 1 Q. B. 43; see *Story on Bills of Exchange*, p. 352; *Allen v. Kemble*, 6 Moo. P. C. 323; and see 2 Russ. Cri. & M. 497.

(z) *Leadbitter v. Farrow*, 5 Mau. & S. 345; *Sowerby v. Butcher*, 2 Cro. & M. 368; *Goupy v. Harden*, 7 Taunt. 160.

(a) *Warwick v. Noakes*, Peake, R. 67.

addressed, or their agent, and therefore confers no right of property; otherwise, if it had been delivered to the postman.

The contents of such a parcel, while remaining in the banking house, under such circumstances, remain there, at the risk of the bankers who made it up, and it is still subject to their control; for, a writ of extent binds from the test, and such property as bills of exchange is bound, while in the custody of the debtor.^(b)

London Agent.—Some country bankers pay the London banker, who acts as their agent and correspondent, a fixed annual sum, for conducting their agency business. Others allow a commission on the amount of the transactions during the year. There are many country bankers who pay no commission, but leave a sum of money in the hands of their London agents, in the nature of a deposit, against *which they are not permitted to draw. In such cases, the sum, which is said [*438] to vary from 4,000*l.* to 30,000*l.*, is altogether withdrawn from the general account of the country banker, and placed to another, called the deposit account.

On all stock, in the public or other funds, purchased or sold by the banker for his customer, he is allowed one-half the commission charged by the broker.^(c)

Limitations.—A question of importance respecting the operation of the Statute of Limitations, on the relations between country bankers and their town correspondents.

A. and B. were bankers, at Norwich, for whom C. & Co., their London correspondents, had accepted bills, between the years 1784 and 1806, to the amount of nearly 900*l.*, which, however, had neither been taken up, nor presented for payment. A. dies in 1808, and shortly after his death, a commission of bankruptcy issues against B. At that time there was a considerable balance belonging to B. in the hands of C. & Co., and this they paid over to the assignees of B., less a sum equal to the amount of the bills they had accepted, as above.

The bills being outstanding then, was considered to be no ground for presuming that they had been satisfied, notwithstanding the length of time which had elapsed; and the London bankers were considered to be entitled to retain, until either the bills were accounted for, or they themselves were indemnified.^(d)

Issue of Bank Notes.—The regulations under which bankers are allowed to issue their promissory notes, &c., are contained, among other matters, in a statute which enacts as follows:—^(e)

“That from and after the first day of July, 1828, it shall be lawful for any person or persons, carrying on the business of a banker [*439] or *bankers in England, (except within the city of London, or within three miles thereof,) having first duly obtained a license for that purpose, and given security, by bond, in manner hereinafter mentioned, to issue, on unstamped paper, promissory notes, for any sum of money

(b) *Rex v. Lambton*, 5 Price, 428.

(c) *Lawson's Hist. of Banking*, 257.

(e) 9 Geo. IV. c. 23, s. 1.

(d) *Morse v. Williams*, 3 Camp. 413.

amounting to five pounds or upwards, expressed to be payable to the bearer, on demand, or to order, at any period, not exceeding seven days after sight; and also to draw and issue, on unstamped paper, bills of exchange, expressed to be payable to order, on demand, or at any period not exceeding seven days after sight, or twenty-one days after the date thereof: *provided* such bills of exchange be drawn upon a person or persons carrying on the business of a banker or bankers, in London, Westminster, or the borough of Southwark; or, *provided*, such bills of exchange be drawn by any banker or bankers, at a town or place, where he or they shall be duly licensed to issue unstamped notes and bills, under the authority of this act, upon himself or themselves, or his or their co-partner, or copartners, payable at any other town or place, where such banker or bankers shall also be duly licensed to issue such notes and bills as aforesaid."

A subsequent statute, usually known as the Bank Charter Act, of 1844, limits the power of issuing, by the following enactments:—

"That(*f*) from and after 19th July, 1844, no person, other than a banker, who, on 6th May, 1844, was lawfully issuing his own bank notes, shall make or issue bank notes, in any part of the United Kingdom.

"That(*g*) from and after 19th July, 1844, it shall not be lawful for any banker to draw, accept, make or issue, in England or Wales, any bill of exchange, or promissory note, or engagement for the payment of money, payable to bearer on demand, or to *borrow, owe, or take up*,(*h*) in England or Wales, any sums or sum of money on the bills *or notes [**440*] of such banker, payable to bearer on demand, save and except that it shall be lawful for any banker, who was on the 6th day of May, 1844, carrying on the business of a banker in England or Wales, and was then lawfully issuing, in England or Wales, his own bank notes,

(*f*) 7 & 8 Vict. c. 32, s. 10. Section 28 defines various terms as follows (the previous sections having regulated the mode of transacting the business of the Bank of England):—The term, "bank notes," used in this act shall extend and apply to all bills or notes for the payment of money to the bearer on demand other than bills or notes of the governor and company of the Bank of England; the term "Bank of England notes" shall extend and apply to the promissory notes of the Governor and Company of the Bank of England, payable to bearer on demand; the term "banker" shall extend and apply to all corporations, societies, partnerships and persons, and every individual person carrying on the business of banking, whether by the issue of bank notes or otherwise, except only the Governor and Company of the Bank of England.

(*g*) 7 & 8 Vict. c. 32, s. 11.

(*h*) The acceptance by a bank of a bill drawn by a customer on account of money of the latter in hands of former, is a *borrowing* within these words, though it be payable at a distant day. *Bank of England v. Anderson*, 3 Bing. N. C. 589. Where a London joint stock bank, consisting of more than six persons, agreed with a Canadian bank that G. P., the manager of the London bank, (but not a partner therein,) should accept bills drawn by the Canadian bank, payable at a date earlier than six months, and the London joint stock bank should provide funds for meeting them; the acceptance of such bills was held to be unlawful within the above language. *Booth v. Bank of England*, 6 Bing. N. C. 415; 8 C. C. 2 Keen, 466; in *Dom. Proc.* 7 Cla. & F. 509. Since 19th July, 1844, any partnership in bankers, though exceeding six in number, carrying on business in London, or within sixty-five miles thereof, may draw, accept or indorse bills of exchange, *not being payable to bearer on demand*, anything, &c., notwithstanding. 7 & 8 Vict. c. 32, s. 26; and see 3 & 4 Will. IV. c. 98, s. 3; *Perring v. Dunston, Ry. & My.* 426.

under the authority of a license to that effect, to continue to issue such notes to the extent, and under the conditions hereinafter mentioned, but not further or otherwise; and the right of any company or partnership to continue to issue such notes, shall not be in any manner prejudiced or affected by any change which may hereafter take place in the personal composition of such company or partnership, either by the transfer of any shares or share therein, or by the admission of any new partner or member thereto, or by the retirement of any present partner, or member therefrom: provided always, that it shall not be lawful for any company or copartnership, now consisting of only six or less than six persons, to issue bank notes at any time, after the number of partners therein shall exceed six in the whole."

A banker, who once becomes bankrupt, or ceases to issue his own notes, is thus strictly prohibited from recommencing the issue; if once he withdraws from business, or his notes from circulation, he can never send them out again; as follows:—

"Be it enacted,⁽ⁱ⁾ that if any banker in any part of the United Kingdom, who, after 19th July, 1844, shall be entitled to issue bank notes, shall become bankrupt, or shall cease to carry on the business of a banker, or shall discontinue the issue of bank notes, either by agreement with the Governor and Company, of the Bank of England or otherwise, it shall not be lawful for such banker at any time thereafter to issue any such notes."

Returns of Circulation.—Then, the existing banks of *issue, [*441] are allowed to continue as banks of issue, under the restrictions, as to returns and other matters, as follows:—

"And be it enacted,^(k) that every banker claiming under this act to continue to issue bank notes in England or Wales, shall, within one month next after 19th July, 1844, give notice in writing to the commissioners of stamps and taxes, at their head office in London, of such claim, and of the place and name and firm, at and under which such banker has issued such notes during the twelve weeks next preceeding the 27th April, 1844; and thereupon the said commissioners shall ascertain if such banker was, on 6th May, 1844, carrying on the business of a banker, and lawfully issuing his own bank notes in England or Wales, and if it shall so appear, then the said commissioners shall proceed to ascertain the average amount of the bank notes of such banker, which were in circulation during the said period of twelve weeks preceeding 27th April, 1844, according to the returns made by such banker, in pursuance of the stat. 4 & 5 Vict. c. 50; and the said commissioners, or any two of them, shall certify, under their hands to such banker, the said average amount, when so ascertained as aforesaid; and it shall be lawful for every such banker to continue to issue his own bank notes after 19th July, 1844: provided nevertheless, that such banker shall not at any time after 10th of October, 1844, have in circulation, upon the average of a period of four weeks, to be ascertained as hereinafter mentioned, a greater amount of notes than the amount so certified."^(l)

(i) 7 & 8 Vict. c. 32, s. 12.

(k) 7 & 8 Vict. c. 32, s. 13.

(l) See further ss. 14 and 15, as to evidence of amount of notes in circulation, s. 15.

Weekly Returns.—The regulations of the returns of bank notes in circulation, other than those of the Bank of England, prescribed by the statute just mentioned, under a penalty of 50*l.*, are as follows:—

“Be it enacted,^(m) that from and after the 1st July, 1841, all corporations and copartnerships, carrying on banking business under the provisions of the said act of 7 Geo. 4, c. 46, and all other persons carrying on banking business in England and Wales, and making and issuing promissory notes, payable to bearer on demand, and all corporations, copartnerships, and persons carrying on such business, and making and issuing such promissory notes as aforesaid in Scotland, and also the Governor and Company of the Bank of Ireland, and all corporations, copartnerships, and persons carrying on such business, and making and issuing such promissory notes as aforesaid, in Ireland, shall severally keep just and true accounts of the amount of notes in circulation at the [*442] close of the business in each week, and shall, at the *end of every four weeks, make up from such weekly accounts, a just and true account of the average amount of such notes in circulation during such four weeks; and shall also, within seven days after the conclusion of such four weeks, return and deliver such last-mentioned account for the four weeks immediately preceding, and so on every successive four weeks, such accounts being always verified in the manner hereinafter directed, to the commissioners of stamps and taxes, at their head office in Westminster, upon pain that any corporation, company, copartnership, or persons or person, who shall neglect or omit to keep, or to return and deliver, any such account in the manner directed by this act, shall, for every such neglect or omission, forfeit the sum of fifty pounds, to be recovered, with full costs of suit, in the name of her majesty’s attorney or solicitor-general in England or Ireland, or of her majesty’s advocate-general in Scotland.

“And⁽ⁿ⁾ be it enacted, that every such account so to be returned and delivered to the commissioners of stamps and taxes as aforesaid, shall be verified by the affidavit or affirmation of the secretary, accountant, cashier, or other chief clerk or officer of the corporation, company, or copartnership, or persons or person, so carrying on banking business, and making such return; and such affidavit or affirmation shall be made before any justice of the peace in any part of the United Kingdom, or before a master extraordinary in Chancery, or any person authorized to take affidavits by any of the superior Courts in England or Ireland: and no such affidavit or affirmation shall be liable to any stamp duty.

“And^(o) be it enacted, that from the accounts which shall be rendered by the Governor and Company of the Bank of England, in pursuance of the act in that behalf, and also from the accounts which shall be rendered in pursuance of this act, there shall be made up an account of the average aggregate amount of promissory notes payable to bearer on demand, which have been in circulation in the United Kingdom during the preceding four weeks, and so on every successive four weeks, dis-

(m) 4 & 5 Vict. c. 50, s. 1.

(n) 4 & 5 Vict. c. 50, s. 2.

(o) Id. s. 3.

tinguishing those circulated by the Bank of England, by private banks, and by joint stock banks in England and Wales, by the banks in Scotland, by the Bank of Ireland, and by all other banks in Ireland, and of the average amount of the bullion in the Bank of England, during the preceding four weeks; and such account shall be published in the London Gazette, in every four weeks, as soon as the same can conveniently be prepared for that purpose."

Monthly Averages.—Any excess, above the limited monthly average circulation, is prohibited, as follows:—

"And(*p*) be it enacted, that if the monthly average circulation of bank notes of any banker, taken in the manner hereinafter directed, (*q*) *shall at any time exceed the amount which such banker is [*443] authorized to issue, and to have in circulation under the provisions of this act, such banker shall in every such case, forfeit a sum equal to the amount by which the average monthly circulation, taken as aforesaid, shall have exceeded the amount which such banker was authorized to issue, and to have in circulation as aforesaid."

A further provision, for the render of accounts, thus enacts:—

"And(*r*) be it enacted, that every banker in England and Wales, who, after 10th October, 1844, shall issue bank notes, shall, on some one day in every week after 19th October, 1844, (such day to be fixed by the Commissioners of Stamps and Taxes,) transmit to the said commissioners an account of the amount of the bank notes of such banker in circulation on every day during the week ending on the next preceding Saturday, and also an account of the average amount of the bank notes of such banker in circulation during the same week; and on completing the first period of four weeks, and so on completing each successive period of four weeks, every such banker shall annex to such account the average amount of bank notes of such banker in circulation during the said four weeks, and also the amount of such bank notes which such banker is authorized to issue under the provisions of this act; and every such account shall be verified by the signature of such banker, or his chief cashier, or in the case of a company or partnership, by the signature of a managing director, or partner, or chief cashier, of such company or partnership, and shall be made in the form to this act annexed, marked;(B.) and so much of the said return as states the weekly average amount of the notes of such bank, shall be published by the said commissioners in the next succeeding "London Gazette," in which the same may be conveniently inserted; and if any such banker shall neglect, or refuse to render any such account, in the form and at the time required by this act, or shall at any time render a false account, in the form and at the time required by this act, or shall at any time render a false account, such banker shall forfeit the sum of one hundred pounds for every such offence."

The monthly average is to be ascertained, thus:—

"And(*s*) be it enacted, that for the purpose of ascertaining the monthly average amount of bank notes of each banker in circulation, the aggre-

(*p*) 7 & 8 Vict. c. 32, s. 17.

(*q*) See 7 & 8 Vict. c. 32, s. 19, inf., p. 443.

(*r*) 7 & 8 Vict. c. 32, s. 18.

(*s*) Id. s. 19.

gate of the amount of bank notes of each such banker in circulation on every day of business during the first complete period of four weeks next after 10th October, 1844, such period ending on a Saturday, shall be divided by the number of days of business in such four weeks; and the average so ascertained shall be deemed to be the average of bank notes of each such banker in circulation during such period of four weeks, and [*444] so in each successive period of four weeks *and such average is not to exceed the amount certified by the Commissioners of Stamps and Taxes as aforesaid."

Then the commissioners (now the Board of Inland Revenue) were empowered, (but only with the consent of the Lords of the Treasury,) to examine, copy, &c., the books of all banks of issue, containing accounts of the notes in circulation, to insure the rendering true accounts.(t)

Return of Names, &c.—Then follows a very material enactment, prescribing annual returns of names of partners, &c., in all banking establishments whatever; thus:—

"And(u) be it enacted, that every banker in England and Wales, who is now carrying on, or shall hereafter carry on business as such, shall, on the first day of January in each year, or within fifteen days thereafter, make a return to the commissioners of stamps and taxes, at their head office in London, of his name, residence, and occupation, or, in the case of a company or partnership, of the names, residence, and occupation of every person composing, or being a member of such company or partnership, and also the name of the firm under which such banker, company, or partnership, carry on the business of banking, and of every place where such business is carried on.

"*Penalty.*—And if any such banking company, or partnership, shall omit or refuse to make such return within fifteen days after the said first day of January, or shall wilfully make other than a true return of the persons as herein required, every banker, company, or partnership, so offending, shall forfeit and pay the sum of fifty pounds; and the said commissioners of stamps and taxes shall, on or before the first day of March in every year, publish in some newspaper circulating within each town or county respectively, a copy of the return so made by every banker, company, or partnership, carrying on the business of bankers within such town or county respectively, as the case may be."

Quarterly Returns.—Besides the above regulations, however, the obligation to render quarterly returns, together with other regulations, had been already, by a previous statute, imposed upon bankers issuing their own notes; enacting thus:—

"That(x) all corporations and copartnerships carrying on banking business under 7 Geo. IV. c. 46, and all other persons carrying [*445] on *banking business, and making and issuing promissory notes payable to bearer on demand, shall respectively keep weekly accounts from the 28th of August, 1833, of the average amount of notes in circulation at the end of each week of the corporation, copartnership, or per-

(t) 7 & 8 Vict. c. 32, s. 20.

(u) Id. s. 21.

(x) 3 & 4 Will. IV. c. 83, s. 1.

sons or person so carrying on banking business and keeping such weekly account; and shall, within one month after the thirty-first day of December, after the 28th day of August, 1833, make up from such weekly account an average account of the amount of such notes in circulation during the period between the 28th of August, 1833, and the making up such account; and shall also make up a like account at the end of each quarter, ending on the first day of April, the first day of July, the first day of October, and the first day of January, in the year 1834, and every subsequent year, of the average amount of notes in circulation in the preceding quarter, and shall return and deliver such account to the commissioners of stamps, at the stamp office in London; and such accounts and returns shall be verified upon the oath of the secretary or accountant, or some officer of the corporation, company or copartnership or persons so carrying on banking business, and making such return, which oath shall be taken before any justice of the peace, and which oath any justice of the peace is hereby authorized to administer.

“Penalty.—And if any corporation, company or copartnership, or persons or person so carrying on banking business, shall neglect to keep such weekly accounts, or to make out or to return or deliver such averages to the commissioners of stamps, at the stamp office in London, or if any secretary, accountant, or other person verifying any such account or average, shall return or deliver to the commissioners of stamps any false account or return of such averages, the corporation, company or copartnership, or persons or person to whom any such account or averages, or such secretary, accountant, or person verifying the account, shall belong, shall forfeit for every such offence the sum of 500*l.*; and the secretary or other person so offending shall also forfeit for every such offence the sum of 100*l.*; and any secretary, accountant, or other person who shall knowingly and wilfully take any false oath as to any such account or averages, shall be subject to such pains and penalties as are by any law in force at the time of taking such oath enacted, as to persons convicted of wilful and corrupt perjury.”

Uniting of Banks of Issue.—A provision is made for the purpose of facilitating the uniting together of banking establishments, as far as regards the circulation of their notes, thus:—

“And(*y*) be it enacted, that in case it shall be made to appear to the commissioners of stamps and taxes, at any time hereafter, that any two or more banks, each such bank consisting of not more than six persons, have, by written contract or agreement (which contract *or agreement shall be produced to the said commissioners,) become united sub- [*446]sequently to the passing of this act, it shall be lawful to the said commissioners, upon the application of such united bank, to certify, in manner hereinbefore mentioned, the aggregate of the amounts of bank notes which such separate banks were previously authorized to issue, and so from time to time; and every such certificate shall be published in manner hereinbefore directed; and from and after such publication, the amount therein stated shall be and be deemed to be the limit of the

amount of bank notes which such united bank may have in circulation : provided always, that it shall not be lawful for any such united bank to issue bank notes at any time after the number of partners therein shall exceed six in the whole."

Bankers' Licenses.—The licensing of bankers to act as such, is regulated thus :—

"And(z) be it enacted, that it shall be lawful for any two or more of the commissioners of stamps to grant to all persons carrying on the business of bankers in England (except as aforesaid,) who shall require the same, licenses authorizing such persons to issue such promissory notes, and to draw and issue such bills of exchange as aforesaid, on unstamped paper; which said licenses shall be and are hereby respectively charged with a stamp duty of thirty pounds for every such license.

"And(a) that a separate license shall be taken out in respect of every town or place where any such unstamped promissory notes or bills of exchange as aforesaid shall be issued or drawn : provided always, that no person or persons shall be obliged to take out more than four licenses in all for any number of towns or places in England; and in case any person or persons shall issue or draw such unstamped notes or bills as aforesaid, at more than four different towns or places, then, after taking out three distinct licenses for three of such towns or places, such person or persons shall be entitled to have all the rest of such towns or places included in a fourth license.

"And(b) be it enacted, that every banker who shall be liable by law to take out a license from the commissioners of stamps and taxes, to authorize the issuing of notes or bills, shall take out a separate and distinct license for every town or place at which he shall, by himself or his agent, issue any notes or bills requiring such license to authorize the issuing thereof, anything in any former act contained to the contrary thereof notwithstanding :

"Provided always, that no banker, who, on or before the 6th May, 1844, had taken out four such licenses, which on the said last-mentioned [*447] day were respectively in force, for the issuing of any such *notes or bills, at more than four separate towns or places, shall at any time hereafter be required to take out or to have in force at one and the same time more than four such licenses, to authorize the issuing of such notes or bills, at all or any of the same towns or places specified in such licenses in force on the said 6th May, 1844, and at which towns or places respectively such bankers had on or before the said last-mentioned day issued such notes or bills in pursuance of such licenses or any of them respectively.

"And(c) be it further enacted, that every license granted under the authority of this act (9 Geo. IV. c. 23,) shall specify all the particulars required by law to be specified in licenses to be taken out by persons issuing promissory notes, payable to bearer on demand, and allowed to be reissued; and every such license which shall be granted between the

(z) 9 Geo. IV. c. 23, s. 2.

(b) 7 & 8 Vict. c. 32, s. 22.

(a) Id. s. 3.

(c) 9 Geo. IV. c. 23, s. 4; see also s. 5.

tenth day of October and the eleventh day of November in any year, shall be dated on the eleventh day of October, and every such license which shall be granted at any other time shall be dated on the day on which the same shall be granted; and every such license shall (notwithstanding any alteration which may take place in any copartnership of persons to whom the same shall be granted,) have effect and continue in force from the day of the date thereof, until the tenth day of October then next following, both inclusive, and no longer."

Stamped Bank Notes.—Bankers are prohibited from issuing their promissory notes on stamped paper, thus:—

"Provided always,^(d) that if any banker or bankers, who shall take out a license under the authority of this act, shall issue, under the authority either of this or any other act, any unstamped promissory notes for payment of money to the bearer on demand, such banker or bankers shall, so long as he or they shall continue licensed as aforesaid, make and issue on unstamped paper all his or their promissory notes for payment of money to the bearer on demand, of whatever amount such notes may be; and it shall not be lawful for such banker or bankers, during the period aforesaid, to issue *for the first time*, any such promissory notes as aforesaid, on stamped paper."

Security on Issue of Unstamped Bank Notes.—Bankers licensed to issue their unstamped paper, are required to give security, thus:—

"And^(e) be it further enacted, that before any license shall be granted to any person or persons to issue or draw any unstamped promissory notes or bills of exchange, under the authority of this act, such person or persons shall give security, by bond, to his majesty, *his heirs [*448] and successors, with a condition, that if such person or persons do and shall from time to time enter or cause to be entered in a book or books to be kept for that purpose, an account of all such unstamped promissory notes and bills of exchange as he or they shall so as aforesaid issue or draw, specifying the amount or value thereof respectively, and the several dates of the issuing thereof: and in like manner also, a similar account of all such promissory notes, as, having been issued as aforesaid, shall have since been cancelled, and the dates of the cancelling thereof, and of all such bills of exchange as, having been drawn or issued as aforesaid, shall have been paid, and the dates of the payment thereof; and do and shall from time to time, when thereunto requested, produce and show such accounts to, and permit the same to be examined and inspected by, the said commissioners of stamps, or any officer of stamps appointed under the hands and seals of the said commissioners for that purpose; and also do and shall deliver to the said commissioners of stamps half-yearly, (that is to say,) within fourteen days after the first day of January and the first day of July in every year, a just and true account in writing, verified upon the oaths or affirmations, (which any justice of the peace is hereby empowered to administer,) to the best of the knowledge and belief of such person or persons, and of his or their cashier, accountant, or chief clerk, or of such of them as the said commissioners

(d) Id. s. 6.

(e) Id. s. 7.

shall require, of the amount or value of all unstamped promissory notes and bills of exchange, issued under the provisions of this or any former act, in circulation within the meaning of this act on a given day, (that is to say,) on Saturday in every week, for the space of half a year prior to the half-yearly day immediately preceding the delivery of such account, together with the average amount or value of such notes and bills so in circulation, according to such account; and also do and shall pay or cause to be paid to the receiver-general of stamp duties in Great Britain, or to some other person duly authorized by the commissioners of stamps to receive the same, as a composition for the duties which would otherwise have been payable for such promissory notes and bills of exchange issued or in circulation during such half-year, the sum of three shillings and six-pence for every one hundred pounds, and also for the fractional part of one hundred pounds, of the said average amount or value of such notes and bills in circulation, according to the true intent and meaning of this act; and on due performance thereof such bond shall be void, but otherwise the same shall be and remain in full force and virtue.

“And(*f*) be it further enacted, that every unstamped promissory note payable to the bearer on demand, issued under the provisions of this act, shall, for the purpose of payment of duty, be deemed to be in circulation from the day of the issuing to the day of the cancelling thereof, both days inclusive, excepting nevertheless the period during which such note shall be in the hands of the banker or bankers who first issued the [*449] same, or by whom the same shall be expressed to be *payable; and that every unstamped promissory note payable to order, and every unstamped bill of exchange so as aforesaid issued, shall for the purpose aforesaid be deemed to be in circulation from the day of the issuing to the day of the payment thereof, both days inclusive:

“Provided always, that every such promissory note payable to order, and bill of exchange as aforesaid, which shall be paid in less than seven days from the issuing thereof, shall, for the purpose aforesaid, be included in the account of notes and bills in circulation on the Saturday next after the day of the issuing thereof, as if the same were then actually in circulation.

“And(*g*) be it further enacted, that in every bond to be given pursuant to the directions of this act, the person or persons intending to issue or draw any such unstamped promissory notes and bills of exchange as aforesaid, or such and so many of the said persons as the commissioners of stamps shall require, shall be the obligors; and every such bond shall be taken in the sum of one hundred pounds, or in such larger sum as the said commissioners of stamps may judge to be the probable amount of the composition or duties that will be payable from such person or persons, under or by virtue of this act, during the period of one year; and it shall be lawful for the said commissioners to fix the time or times of payment of the said composition or duties, and to specify the same in the condition to every such bond; and every such bond may be required to be renewed from time to time, at the discretion of the said commis-

sioners and as often as the same shall be forfeited, or the parties to the same, or any of them, shall die, become bankrupt or insolvent, or reside in parts beyond the seas."

Alteration of Partnership, &c.—Enactments are made to meet changes in partnership in banks, and requiring fresh securities in such cases, and enforcing the renewal of the bonds, thus:—

"And(*h*) be it further enacted, that if any alteration shall be made in any copartnership of persons who shall have given any such security by bond as by this act is directed, whether such alteration shall be caused by the death or retirement of one or more of the partners of the firm, or by the accession of any additional or new partner or partners, a fresh bond shall be given by the remaining partner or partners, or the persons composing the new copartnership, as the case may be, which bond shall be taken as a security for the duties which may be due and owing or may become due and owing, in respect of the unstamped notes and bills which shall have been issued by the persons composing the old copartnership, and which shall be in circulation at the time of such alteration, as well as for duties which shall or may be or become due or owing in respect of the unstamped *notes and bills issued or to be issued [**450*] by the persons composing the new copartnership; provided that no such fresh bond shall be rendered necessary by any such alteration as aforesaid, in any copartnership of persons exceeding six in number, but that the bonds to be given by such last-mentioned copartnerships shall be taken as securities for all the duties they may incur so long as they shall exist, or the persons composing the same, or any of them, shall carry on business in copartnership together, or with any other person or persons, notwithstanding any alteration in such copartnership; saving always the power of the said commissioners of stamps to require a new bond, in any case where they shall deem it necessary for better securing the payment of the said duties.

"And(*i*) be it further enacted, that if any person or persons who shall have given security, by bond, to his majesty, in the manner hereinbefore directed, shall refuse or neglect to renew such bond when forfeited, and as often as the same is by this act required to be renewed, such person or persons so offending shall for every such offence forfeit and pay the sum of *one hundred pounds*."

Definition of Bank Notes.—What shall be deemed bank notes, within the meaning of the Bank Charter Act, of 1844, (7 & 8 Viet. c. 32,) as regards the enactments concerning stamps, has been subsequently defined, as follows(*k*):—

"All bills, drafts or notes, other than notes of the Bank of England, which shall be issued by any banker, or the agent of any banker for the payment of money to the bearer on demand; and all bills, drafts or notes so issued which shall entitle or be intended to entitle the bearer or holder thereof, without indorsement, or without any further or other indorsement than may be thereon at the time of the issuing thereof, to the pay-

(*h*) Id. s. 10.

(*k*) 17 & 18 Vict. c. 83, s. 11.

(*i*) 9 Geo. IV. c. 23, s. 11.

ment of any sum of money on demand, whether the same shall be so expressed or not, in whatever form and by whomsoever such bills, drafts or notes shall be drawn or made: shall be deemed to be bank notes of the banker by whom or by whose agent the same shall be issued within the meaning of the said act.

"All bills,^(l) drafts and notes which by or under this act, or 7 & 8 Vict. c. 32, are declared or deemed to be bank notes, shall be liable to the stamp duties and composition for stamp duties, imposed or payable under any act or acts in force upon or in respect of promissory notes, for the payment of money to the bearer on demand; and all clauses, provisions, regulations, penalties and forfeitures, contained in any act or acts relating to the issuing of such promissory notes, or for securing the said stamp duties and composition respectively, or for preventing or [*451] punishing frauds or evasions in relation thereto, shall *respectively be deemed to apply to all such bills, drafts and notes as aforesaid, and to the stamp duties and composition payable upon or in respect thereof, &c."

Stamps on Bankers' Acknowledgments, &c.—We may here recite a late enactment, abolishing the exemptions from stamp duties, granted by former statutes, on bankers' letters, acknowledging the safe arrival of securities for money; thus:—

"Whereas^(m) under and by virtue of certain acts relating to the stamp duties, letters by the general post acknowledging the safe arrival of any bills of exchange, promissory notes, or other securities for money, are excepted from the stamp duty granted and imposed on receipts or discharges given for or upon the payment of money; be it enacted, that the said exemption shall be and the same is hereby repealed."

But the exemption from receipt stamps remains on:⁽ⁿ⁾

"Receipts given for money deposited in any bank or in the hands of any banker, to be accounted for, whether with interest or not, *provided* the same be not expressed to be received of or by the hands of any other than the person to whom the same is to be accounted for; *provided* always, that this exemption shall not extend to receipts or acknowledgments for sums paid or deposited for or upon letters of allotment of shares, or in respect of calls upon any scrip or shares of or in any joint-stock or other company, or proposed or intended company, which said last-mentioned receipts or acknowledgments, by whomsoever given, shall be liable to the duty by this act charged on receipts."

Post dating Bank Notes, &c.—To post date an unstamped bankers' promissory note, or bill of exchange, is punishable, as follows:—

"And^(o) be it further enacted, that if any person or persons who shall be licensed under the provisions of this act, shall draw or issue, or cause to be drawn or issued, upon unstamped paper, any promissory note payable to order, or any bill of exchange which shall bear date subsequent to the day on which it shall be issued, the person or persons so offending

(l) 17 & 18 Vict. c. 83, s. 12. As to the composition mentioned above, see 7 & 8 Vict. c. 32, ss. 23, 24, and 19 & 20 Vict. c. 20.

(m) 17 & 18 Vict. c. 83, s. 13.

(n) 16 & 17 Vict. c. 59, sched.

(o) 9 Geo. IV. c. 23, s. 12.

shall for every such note or bill so drawn or issued forfeit the sum of *one hundred pounds*.

*“Provided(*p*) always, that nothing in this act (viz., 9 Geo. IV. c. 23) contained shall extend or be construed to extend to [*452] exempt or relieve from the forfeitures or penalties imposed by any act or acts now in force, upon persons issuing promissory notes or bills of exchange not duly stamped as the law requires, any person or persons who under any colour or pretence whatsoever shall issue any unstamped promissory note or bill of exchange, unless such person or persons shall be duly licensed to issue such note or bill under the provisions of this act, and such note or bill shall be drawn and issued in strict accordance with the regulations and restrictions herein contained.”

Allowance of Stamps.—The cancelling and allowance of useless stamps are thus provided for :—

“And(*q*) whereas it may happen that bankers who may be desirous to issue unstamped promissory notes, payable to bearer on demand, under the provisions of this act, may have provided themselves with stamps for such notes, which may not have been issued, and which may by this act be rendered useless or unnecessary, and it is expedient to enable the commissioners of stamps to cancel and allow such stamps in manner hereinafter mentioned :

“Be it therefore enacted, that where any banker or bankers, who shall take out a license under the authority of this act, shall have in his or their possession stamps for reissuable promissory notes, payable to the bearer on demand, which shall be rendered useless or unnecessary in consequence of such banker or bankers electing to issue such notes on unstamped paper, under the provisions of this act, it shall be lawful for the said commissioners of stamps, and they are hereby authorized and empowered, to cancel and allow such stamps so as aforesaid rendered useless and unnecessary, and to repay the amount or value thereof in money, deducting therefrom the sum of one pound ten shillings for every one hundred pounds, and so in proportion for any greater or less sum than one hundred pounds of such amount or value ; provided proof be made by affidavit or affirmation, to the satisfaction of the said commissioners, that such stamps have not been issued ; and provided application be made for such allowance within six calendar months next after the passing of this act.”

(*p*) 9 Geo. IV. c. 23, s. 13. Then s. 14 provides that all pecuniary forfeitures and penalties incurred under the act are to be recovered in the Court of Exchequer, &c. ; s. 15 saves the privileges of the Bank of England.

(*q*) 9 Geo. IV. c. 23, s. 16.

[*453]

*CHAPTER XV.

COPARTNERSHIPS, ETC., UNDER 7 GEO. IV. C. 46.

It now becomes necessary to state in what respects the legislature has interfered, to qualify or regulate the general law, with respect to bankers, in cases where a great number of persons combine or unite, for the purpose of carrying on a banking establishment. To do this effectually, and in order to secure accuracy, we must place before the reader, in some cases, the actual words of the legislature, together with such expositions of them as have been made, from time to time, by the courts of law and equity, on occasions when questions have arisen, upon the intent and meaning of the statutes respectively establishing banking copartnerships, joint stock banking companies, and savings' banks.

Banks which have been established in conformity with the enactments of the first-mentioned branch of this department of the law, are commonly known as *banking copartnerships*, the term being used in contradistinction to private partnerships in banking concerns, on the one hand, and to joint stock companies engaged in banking, on the other.

By an act of the reign of Geo. III.,^(a) it was forbidden to erect any corporate bank whatever, or any bank where the number of bankers in partnership should exceed six, so as "to borrow, owe, or take up any sum or sums of money, on their bills or notes, payable on demand, or at any less time than six months from the borrowing thereof," during the continuance of the privileges secured to the Bank of England, by former acts of parliament.

[*454] ^{*}In 1826, the statute now in force was passed; the first section of which enacts:—

"That from and after the passing of this act, it shall and may be lawful for any bodies politic or corporate erected for the purposes of banking, or for any number of persons united in covenants or copartnership, although such persons so united, or carrying on business together, shall consist of more than six in number, to carry on the trade or business of bankers in England, in like manner as copartnerships of bankers, consisting of not more than six persons in number, may lawfully do; and for such bodies politic or corporate, or such persons so united as aforesaid, to make and issue their bills or notes at any place or places in England, exceeding the distance of sixty-five miles from London, payable on demand or otherwise, at some place or places specified upon such bills or notes exceeding the distance of sixty-five miles from London, and not elsewhere, and to *borrow, owe, or take up*,^(b) any sum or sums of money on their bills or notes so made and issued at any such place or places as aforesaid:

(a) 39 & 40 Geo. III. c. 28, s. 15.

(b) See *supra*, p. 439, for exposition of these terms; and see also cases *infra*, p. 459, n. (m).

"Provided always, that such corporations or persons carrying on such trade or business of bankers in copartnership, shall not have any house of business or establishment as bankers in London, or at any place or places not exceeding the distance of sixty-five miles from London; and that every member of any such corporation or copartnership shall be liable to and responsible for the due payment of all bills and notes which shall be issued, and for all sums of money which shall be borrowed, owed, and taken up by the corporation or copartnership, of which such person shall be a member, such person being a member at the period of the date of the bills or notes, or becoming or being a member before or at the time of the bills or notes being payable,^(c) or being such member at the time of the borrowing, owing, or taking up of any sum or sums of money upon any bills or notes by the corporation or copartnership, or while any sum of money on any bills or notes is owing or unpaid, or at the time the same became due from the corporation or copartnership; any agreement, covenant, or contract to the contrary notwithstanding."

Liability of Members.—This first section, it may be observed, considerably enlarged the responsibility attaching at common law to members of ordinary partnerships: *it provides that every member shall be liable for all bills, &c., such person being a member at [*455] the date of the bills; or at the time of their being payable; or while owing or unpaid; so that any person, being a member, at any time between the date of the contract, and the time when the debt arising therefrom is satisfied, is to become liable for its payment. A person might not be a party, or liable to the contract; he might not be a member of the copartnership at the time when proceedings were taken to enforce it, but, by becoming a member at an intermediate period, between the contract and the judgment, he would thereby render himself liable to the payment. This is no small advantage, in theory, given to the creditor of such a concern; it is apparently a liability attaching to any person becoming a member at any time between the above-mentioned periods; practically, the advantage appears to prove of little or no avail, such is the difficulty, delay, and expense of realizing it.

Then the act goes on to say,^(d) that judgment being obtained against the public officer, execution shall issue against any existing member, all such being virtually parties to the proceedings upon which judgment has been obtained; if this execution is ineffectual, then the plaintiff may issue execution against any persons who were members at the time when the contract was entered into; secondly, against persons who became members at any time before such contract was executed; thirdly, against persons who were members at the time the judgment was obtained.

Then there is a limitation of three years,^(d) within which only execution is to issue against persons of the three last-mentioned classes. This is clearly the case at law, but the statute is silent as to proceedings in equity; though it contemplates equitable liabilities, as well as legal lia-

(c) See *Ex parte Prescott*, 1 Mont. & C. 611. This section makes every member of the copartnership liable, upon outstanding notes of the firm, although he were not a member when such notes issued.

(d) Sect. 13, *infra*, p. 480.

bilities, it *does not furnish, on the face of it, any particular [*456] remedy for equitable liabilities.(e)

Nevertheless, in equity also, claims are held to be barred by the lapse of the three years.

Thus, where a testator died, possessed of shares in, and a member of, a banking copartnership, and subject to its liabilities: after the expiration of three years an administration suit was instituted against his estate; the proceedings against the public officer on which the judgments were obtained were adopted some time after the testator's death; it was admitted that execution could not issue against the executors, who were not registered members; in fact, that case is unprovided for by the statute. Now it is to be remembered, that the testator's liability in his lifetime was to have execution issued against him and his property, before, but not after, the expiration of the three years, from the time of his ceasing to be a member. That alone was his liability, notwithstanding the general words in the first clause of the statute. Accordingly, if in a suit instituted as above mentioned, the common decree has been made for taking an account of the deceased's debts, and persons who were creditors of the banking company at his death, come in under the decree and claim to be creditors of the deceased, their claims will be held to be barred by the lapse of three years.

It seems to be free from doubt, that if the courts of equity can give any relief at all against assets of a deceased partner, it can only be to a party applying before the legal liability under this act would have expired, if the party had remained in life.(f)

With respect to the restriction of six partners, &c., and to that of six months, within which notes, &c., were not to be made payable, it may [*457] be observed, that it never was held, *that the statute referred to any but partnerships of persons substantially combined for the purposes of banking; therefore, there was never, any more than at present, any thing to prevent merchants from issuing bills short of six months' date, although the house, issuing them, consisted of more than six partners, if, in reality, they were not bankers, and the bills, &c., were only issued for purposes of commerce.(g)

With respect, generally, to the enactments in the above section, it will be seen, that they prescribe the cases, and the circumstances, &c., in which copartnerships, consisting of more than six persons, may be bankers, in England; with a prohibition of such persons, to have any house of business, as bankers, in London, or at any place, not exceeding the distance of sixty-five miles, from London. Now, in order to ascertain the precise effect of this prohibition, on looking into the decisions on the subject, we find it is settled, that, in order that the defendant, in an action brought by a banking copartnership, in a manner that they

(e) *Straffon's case*, 22 L. J., Ch. 199; S. C., 1 De G., M. & G. 589.

(f) *Barker v. Buttress*, 7 Beav. 134, recognized by *Ld. Truro, C.*, in *Ex parte Gouthwaite*, 3 Mac. & G. 203.

(g) *Wyan v. Fowler*, 2 Chitt. R. 128; S. C., 1 Stark. R. 459; *Perring v. Dunston*, Ry. & M. 426; compare *Bank of England v. Anderson*, 4 Scott, 107; *Broughton v. Manchester Waterworks Company*, 3 B. & A. 1.

could not, but for this act, have brought an action in, and where, therefore, it was necessary that they should show that they had complied with the requisitions, and prohibitions of it, an attempt to show that the body have acted illegally, by having a house of business, within the prohibited distance from London, will fail, unless it shows that their legality was already thus vitiated at the date of the contract they sue upon, or at the time of the commencement of the suit; it is not enough to show their existence to have been illegal *at any time*; and if, in order to make all sure, the defendant alleges, as a reason, why he should not be bound to answer them, that their existence has been illegal, from the formation of the partnership until the commencement of the suit, he must *prove the illegal existence for *the whole* of that period, otherwise his excuse will be incomplete, and he must fail altogether. ^[*458] (h)

Drawing Bills, &c.—The second section restrained these copartnerships from drawing a bill of exchange, payable by an agent, in London, &c.; but for those provisions, the following enactment is now substituted:—

“That it shall be lawful for any body politic or corporate whatsoever, erected or to be erected, and for any other persons united or to be united in covenants or partnership, exceeding the number of six persons carrying on business as bankers, to make any bill of exchange or promissory note of such corporation or copartnership, payable in London by any agent of such corporation or copartnership in London, or to draw any bill of exchange or promissory note upon any such agent in London, payable on demand or otherwise in London, and for any less amount than 50*l.*, anything in the said act of the 7th Geo. IV. or in any other act, to the contrary notwithstanding.” (i)

Name.—Banks of this kind, whether corporate or unincorporated, generally assume a name. As regards *corporate* banks, established under this statute, there is a decision, to the effect, that if A. invents, or frames, a particular name for a bank, and a body of persons, without the consent of A., adopt such name, and become incorporated by that name, A. cannot recover damages from the corporation, for taking possession of such name, and using it, without averring, and proving, that he has carried on business, as a banker, under such name, (k) and so has been injured by their assumption of it.

Borrowing, owing, and taking up.—The third section *it is unnecessary to state, because its enactments have been modified ^[*459] subsequently, and the law now stands thus:—

“Any body politic (l) or corporate, or society or company or partnership, although consisting of more than six partners, to carry on the trade or business of banking in London, or within sixty-five miles thereof, provided that such body politic or society, or company or partnership, do

(h) *Hughes v. Thorpe*, 5 M. & W. 656; *Ramford v. Copeland*, 6 A. & E. 482.

(i) 3 & 4 Will. IV. c. 83, s. 2. Bank post bills issued in London are not made, by operation of 7 Geo. IV. c. 46, s. 15, payable at the branch banks of the Bank of England. *Willis v. Bank of England*, 4 A. & E. 21.

(k) *Lawson v. Bank of London*, 18 C. B. 84.

(l) 3 & 4 Will. IV. c. 98, s. 3.

not borrow, owe, or take up in England, any sum or sums of money on their bills or notes, payable on demand, or at any less time than six months from the borrowing thereof, during the continuance of the privileges granted by *this act*, (viz. 3 & 4 Will. IV. c. 98, to the said Governor and Company of the Bank of England.”

The acceptance of a customer's bill, at less than six months' date, on account of a balance in favour of the customer, is a *borrowing*, in point of law, within the meaning of the statute.^(m)

The drawing of a bill, at a longer period than six months, though the acceptance should be within six months of its maturity, would be a transaction in violation of the provisions of the statute, and all persons, who were privy to it, would be prevented from enforcing the acceptance; though such violation of the prohibition of the statute would not affect a bona fide holder without notice.⁽ⁿ⁾

A firm of more than six persons, not in partnership for banking purposes, does not appear to come within this proviso.^(o)

The effect of this enactment will be the better conceived, from advert-
ing to the circumstance, that the average date of bills drawn in this country, by traders, or by bankers, to represent transactions in trade, are almost all of them within three months, excepting those from the manufacturing districts of Manchester, Birmingham, Sheffield, and
[*460] Leeds, *which are, generally, at three and four months after date.^(p)

Account of Names, &c.—The next enactment, in 7 Geo. IV. c. 46, is section 4, thus:—

“And be it further enacted, that before any such corporation or copartnership, exceeding the number of six persons in England, shall begin to issue any bills or notes, or borrow, owe, or take up any money on their bills or notes, an account or return shall be made out, according to the form contained in the schedule marked (A.)^(q) wherein shall be set forth the true names, title or firm of such intended or existing corporation or copartnership, and also the names or places of abode of all the members of such corporation, or of all the partners concerned or engaged in such copartnership, as the same respectively shall appear on the books of such corporation or copartnership, and the name or firm of every bank or banks established or to be established by such corporation or copartnership, and also the names and places of abode of two or more persons, being members of such corporation or copartnership, and being resident in England, who shall have been appointed public officers of such corporation or copartnership, together with the title of office or other description of such public officer respectively, in the name of any one of whom such corporation shall sue and be sued, as *herein-*

^(m) *Bank of England v. Anderson*, 3 Bing. N. C. 589; S. C., 2 Keen, 328; see *Bank of England v. Booth*, 2 Keen, 460; 7 Cl. & F. 509; per *Ld. Denman*, C. J., *Sims v. Bond*, 5 B. & Ad. 389.

⁽ⁿ⁾ *Per Cur.* 3 Bing. N. C. 665.

^(o) *Perring v. Dunston, Ry. & M.* 426; *vid. sup.* p. 457, n. ^(g).

^(p) See *Lawson's History of Banking*, (London, 1855,) p. 43.

^(q) See *infra*, p. 460.

after provided, and also the name of every town and place where any of the bills or notes of such corporation or copartnership shall be issued by any such corporation, or by their agent or agents, and every such amount or return shall be delivered to the Commissioners of Stamps, at the Stamp Office in London, who shall cause the same to be filed and kept in the said stamp office, and an entry and registry thereof to be made in a book or books, to be there kept for that purpose, by some person or persons to be appointed by the said commissioners in that behalf, and which book or books any person or persons shall from time to time have liberty to search and inspect, on payment of the sum of one shilling for every search.

“SCHEDULE (A.)

“Return or account to be entered at the Stamp Office in London, in pursuance of an act passed in the seventh year of the reign of King George the Fourth, intituled [*here insert the title of this act,*] viz.

“Firm or name of the banking corporation or copartnership, viz. [*set forth the firm or name*].

“Names and places of abode of all the partners concerned or engaged in such corporation or copartnership, viz. [*set forth all the names and places of abode*].

*“Names and places of the bank or banks established by such corporation or copartnership, viz. [*set forth all the names and* [*461] *places*].

“Names and descriptions of the public officers of the said banking corporation or copartnership, viz. [*set forth all the names and descriptions*].

“Names of the several towns and places where the bills or notes of the said banking corporation or copartnership, are to be issued by the said corporation or copartnership, or their agent or agents, viz. [*set forth the names of all the towns and places*].

“A. B. of _____, secretary [*or other officer, describing the office*](*r*) of the above corporation or copartnership, maketh oath and saith, that the above doth contain the name, style, and firm, of the above corporation or copartnership, and the names and places of the abode of the several members thereof, and of the banks established by the said corporation or copartnership, and the names, titles, and descriptions of the public officers of the said corporation or copartnership, and the names of the towns and places where the notes of the said corporation or copartnership are to be issued, as the same respectively appear in the books of the said corporation or copartnership, and to the best of the information, knowledge and belief of this deponent.

“Sworn before me, the _____ day of _____, at _____, in the county of _____

“C. D., justice of the peace in and for the said county.”

A return of an account, omitting the words, *justice of the peace, &c.*, was held to be receivable in evidence, it being proved that C.

(*r*) “Public officer” sufficient, at least without proof that he held a specific office. *Armitage v. Hamer*, 3 B. & Ad. 793.

D., the person signing the verification, was, in fact, a justice of the peace, &c.(s)

This section is become immaterial in one respect, viz., as regards that part of it which makes compliance with it, a condition precedent to the power of issuing notes, because, since 19th July, 1844, by 7 & 8 Vict. c. 32, s. 10, no new bank can issue notes; but, it is necessary to retain it in other respects, because, as to them it is still the law.

The words, *shall sue and be sued, as hereinafter provided*, refer to section 9, the effect of which is stated below.(t)

[*462] Under this section, and the 6th, the date of the account, *or return, is the material thing; that is, to fix who are members; and what is meant, is the day when the officer verifies it, and can be no other day.

Officers.—With respect to the officers to be appointed under this section it is to be remarked, as a principle of the law, that a thing being once shown to exist, it is presumed to continue in the same state, until the contrary be shown, and therefore, if A. B. be shown to have been appointed to the office, (not being an annual office,) he is presumed to remain officer, in the absence of any thing to show any change.(u)

The intention of the legislature, to be gathered from this section, and other provisions of the statute, appears to have been, that there should always, during the continuance of the concern, be a public officer in existence, capable of being sued; and, in all probability, the bank is compellable by law to appoint another immediately, in case the former officer goes out of the jurisdiction, &c.(x)

Also, it has been held, not to be necessary for the appointment to have been made, *after* the company begin to carry on business; it may be made, and, indeed, ought to be made, before they issue notes at all.(y)

Evidence.—Under this section, a certified copy of the return is evidence of the facts pertinently stated in it; it is not necessary to prove that the affidavit verifying it was made by the public registered officer of the company.(z)

[*463] *On the other hand, the return is not the only admissible evidence of these facts, for they may be proved *aliunde*.(a) An annual general return for March, 1848, has been held admissible in evidence, in support of an issue in scire facias, whether the defendant was a member on 24th January, 1848.(b)

By section 4, as has been seen, the return is made evidence, that all

(s) *Bosanquet v. Woodford*, 5 Q. B. 310.

(t) *Infra*, p. 467.

(u) *Steward v. Dunn*, 12 M. & W. 655. A return made to the stamp office, stating A. B. to be officer in March, 1841, is evidence that he is so in November, 1842, S. C., but not the only evidence.

(x) *Per Curiam*, 10 M. & W. 721.

(y) *Steward v. Greaves*, 10 M. & W. 722.

(z) *Bosanquet v. Woodford*, 5 Q. B. 310; see *Steward v. Dunn*, 12 M. & W. 655; see 12 & 13 Vict. c. 1, s. 4, and 7 & 8 Vict. c. 113, ss. 19, 20. If it purports to be signed by the "cashier," it will suffice. *Harvey v. Scott*, 11 Q. B. 92, 102.

(a) *Edwards v. Buchanan*, 3 B. & Ad. 788; *R. v. James*, 7 Car. & P. 553; *Reg. v. Carter*, 1 Den. C. C. 65.

(b) *Bosanquet v. Shortridge*, 4 Exch. 699.

persons named therein, as members of such corporation, or copartnership, were such, at the date of the account, or return. On the other hand, however, when certain proprietors of a company, were sued in scire facias, upon a judgment, against the public officer, the enumeration of proprietors in such a return, to the inland revenue office, was held not receivable in evidence against the plaintiff, to show that at the time they were not proprietors.(c)

It is said to be the rule, not to admit the return, in evidence, unless it has been filed within the time limited by the statute.(d)

The fact of the return having been made, &c., is not a condition precedent to the public officer's right to sue on behalf of the company.(e)

Annual Return.—The continuance of the returns is thus provided for, in section 5 :—

“That such account or return shall be made out by the secretary or other person, being one of the public officers appointed as aforesaid, and shall be verified by the oath of such secretary or other public officer, taken before any justice of the peace,(f) and which oath any justice of the peace is hereby authorized and empowered to administer, and that such account or return shall, between the twenty-eighth day of February and the twenty-fifth day of March in every year, after *such corpo- [*464] ration or copartnership shall be formed, be in like manner delivered by such secretary or other public officer as aforesaid, to the commissioners of stamps, to be filed and kept in the manner and for the purposes as hereinbefore mentioned.”

This is one of the provisions of the legislature, which it is usual to call *directory* ; this kind of provision occurs, when the legislature, enacting something which at common law it is not an offence to violate, omit to annex any penalty, or other made by which their intentions may be enforced, and which, therefore, persons seem to be left pretty much to their choice, whether they will conform to, or not ; it does not seem to be obligatory to file the return within the specified period of the year.(g)

Then, section 6 enacts, that certified copies of such returns shall be evidence.(h)

It is manifest, that register books, in which the names of members are inscribed, from which the above sworn returns are to be copied, cannot be altered, or varied, by the directors, or the company, especially not *post litem motam*, except for the purpose of a merely verbal correction.(i)

(c) Prescott v. Buffery, 1 C. B. 41.

(d) Tayl. Evid. 1364, 2nd edit., citing Prescott v. Buffery.

(e) Bonar v. Mitchell, 5 Exch. 415, decided on similar provisions in the Scotch Banking Act, 7 Geo. IV. c. 67.

(f) See supra, p. 461.

(g) See per Parke, B., Steward v. Dunn, 12 M. & W. 663 ; see also Bosanquet v. Woodford, 5 Q. B. 316, 319 ; and S. P. on Scotch Banking Act, 7 Geo. IV. c. 67 ; Bonar v. Mitchell, 19 L. J., Exch. 302.

(h) See as to the form and requisites of the return, Bosanquet v. Shortridge, 19 L. J., Exch. 221.

(i) Shortridge v. Bosanquet, 16 Beav. 96.

The board of inland revenue are directed, for a fee of ten shillings, to give certified copies of the returns, or accounts, by section 7.

Another account of the names of persons appointed officers, persons ceasing to be members, of persons newly becoming members, &c., &c., is to be made *from time to time*, as occasion requires, by section 8:—

“That the secretary or other officer of every such corporation or copartnership shall, and he is hereby required, from time to time, as often as occasion shall render it necessary, make out upon oath, in manner hereinbefore directed, and cause to be delivered to the commissioners of stamps [*465] as aforesaid, a further account or return, according *to the form contained in the schedule marked (B.), (k) of the name or names of any person or persons who shall have been nominated or appointed a new or additional public officer or public officers of such corporation or copartnership, and also of the name or names of any person or persons who shall have ceased to be members of such corporation or copartnership, and also of the name or names of any person or persons who shall have become a member or members of such corporation or copartnership, either in addition to or in the place or stead of any former member or members thereof, and of the name or names of any new or additional town or towns, place or places, where such bills or notes are or are intended to be issued, and where the same are to be made payable; and such further accounts or returns shall from time to time be filed and kept, and entered and registered at the stamp office in London, in like manner as is hereinbefore required with respect to the original or annual account or return hereinbefore directed to be made. (l)

“ SCHEDULE (B.)

“Return or account, to be entered at the stamp office in London, on behalf of, [*name the corporation or copartnership,*] in pursuance of an act passed in the seventh year of the reign of King George the Fourth, intituled, [*insert the title of this act,*] viz.

“Names of any and every new or additional public officer of the said corporation or copartnership, viz.

“A. B. in the room of C. D., deceased, or removed, [*as the case may be; set forth every name*].

“Names of any and every person who may have ceased to be a member of such corporation or copartnership, viz. [*set forth every name*].

“Names of any and every person who may have become a new member of such corporation or copartnership, [*set forth every name*].

“Names of any additional towns or places where bills or notes are to be issued, and where the same are to be made payable.

“A. B. of _____, secretary [*or other officer*] of the above-named corporation or copartnership, maketh oath and saith, that the above doth contain the name and place of abode of any and every person who hath become or been appointed a public officer of the above corporation or copartnership, and also the name and place of abode of any and every per-

(k) See *infra*, p. 465.

(l) See *Shortridge v. Bosanquet*, 16 Beav. 84.

son who hath ceased to be a member of the said corporation or copartnership, and of any and every person who hath become a member of the said copartnership since the registry of the said corporation or copartnership, on the day of last, as the same respectively appear on the books of the said corporation *or copartnership, and to the best of the information, knowledge, and belief of this deponent. [*466]

“Sworn before me, day of , at , in the county of .

“C. D., justice of the peace in and for the said county.”

But, besides the returns mentioned in this section, there are also other returns to be made, under 7 & 8 Vict c. 32, s. 21, which enacts, *(m)* that every banker shall, on 1st January, in each year, or within fifteen days thereafter, make a return of his name, &c., and, in case of a copartnership, of the name, residence, and occupation of every member, with other particulars. *(n)*

It appears to be material, to observe these various provisions requiring these returns; because, although they are not enforced by penalties, still, in some circumstances, the body might be indicted for the common law misdemeanor, or nonfeasance of disobeying a statute. *(n)*

But, however that may be, obviously it is most important for members, or shareholders, of these bodies, that these returns should be, in all respects, accurately made, &c.; because, upon their accuracy, may often depend the question of the non-liability, or liability of a shareholder, when a judgment has been obtained against the company.

Thus, if, for instance, the object is to make A. liable in such case, by showing that he was a member at the time the contract was entered into, and by the returns, previous to the date of the contract, it appears that he was then a member, and there are returns subsequent, showing the same, and no return of his retirement; it will be taken, that he was a member at the time of the contract, unless he can prove, unanswerably, that he had at that time transferred his shares, and retired from the copartnership. *(o)*

*So, the omission of the public officer to make any return, may, in like manner, involve members in losses, which, properly, they are not liable for. *(p)* [*467]

Therefore, it is very important for shareholders to watch these returns with vigilance.

Actions, Suits, Prosecutions, &c.—The mode of suing, petitioning in bankruptcy, prosecuting, &c. is prescribed in section 9, thus:—

“That all actions and suits, and also all petitions to found any commission of bankruptcy against any person or persons, who may be at any

(m) See the terms of the enactment, *supra*, p. 444.

(n) See also *Burnes v. Pennell*, 2 H. Lds. 479.

(o) *Harvey v. Scott*, 11 Q. B. 106. In *Bosanquet v. Shortridge*, 4 Exch. 699, a return made after the commencement of the action was admitted, because it tended to show the defendant to be still a member; see also *Prescott v. Buttery*, 1 C. B. 41.

(p) *Ex parte Prescott*, 1 Mont & Ch. 611.

time indebted to any such copartnership, carrying on business under the provisions of this act, and all proceedings at law or in equity under any commission of bankruptcy, and all other proceedings at law or in equity to be commenced or instituted for or on behalf of any such copartnership against any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, for recovering any debts, or enforcing any claims or demands due to such copartnership, or for any other matter relating to the concerns of such copartnership, shall and lawfully may, from and after (26th May, 1826,) be commenced or instituted, and prosecuted in the name of any one of the public officers nominated as aforesaid, for the time being of such copartnership, as the nominal plaintiff or petitioner for and on behalf of such copartnership; and that all actions or suits or proceedings at law or in equity, to be commenced or instituted by any person or persons, bodies politic or corporate, or others, *whether members of such copartnership or otherwise*, against such copartnership, shall and lawfully may be commenced, instituted and prosecuted against any one or more of the public officers nominated as aforesaid, for the time being of such copartnership, as the nominal defendant for and on behalf of such copartnership :

“And that all indictments, informations and prosecutions, by or on behalf of such copartnership, for any stealing or embezzlement of any money, goods, effects, bills, notes, securities or other property of or belonging to such copartnership, or for any fraud, forgery, crime or offence committed against or with intent to injure or defraud such copartnership, shall, and lawfully may be had, preferred and carried on, in the name of one of the public officers nominated as aforesaid, for the time being of such copartnership :

“And that in all indictments and informations to be had or preferred by or on behalf of such copartnership, against any person or persons whomsoever, notwithstanding such person or persons, may happen to be a member or members of such copartnership, it shall be lawful and sufficient to state the money, goods, effects, bills, notes, *securities [*468] or other property of such copartnership, to be the money, goods, effects, bills, notes, securities or other property of any one of the public officers nominated as aforesaid for the time being of such copartnership :

“And that any forgery, fraud, crime, or other offence committed against or with intent to injure or defraud any such copartnership, shall and lawfully may in such indictment or indictments, notwithstanding as aforesaid, be laid or stated to have been committed against or with intent to injure or defraud any one of the public officers nominated as aforesaid for the time being of such copartnership; and any offender or offenders may thereupon be lawfully convicted for any such forgery, fraud, crime or offence; and that in all other allegations, indictments, informations or other proceedings of any kind whatsoever, in which it otherwise might or would have been necessary to state the names of the persons composing such copartnership, it shall and may be lawful and sufficient to state the name of one of the public officers nominated as aforesaid for the time being of such copartnership :

“And the death, resignation, removal, or any act of such public officer,

shall not abate or prejudice any such action, suit, indictment, information, prosecution, or other proceeding commenced against or by or on behalf of such copartnership, but the same be continued, prosecuted and carried on in the name of any other of the public officers of such copartnership for the time being."

This section has been considered to empower a company to sue out a *fiat* in bankruptcy, by their public officer, against a shareholder, upon a debt due from him to the company, in respect of an unsettled account, precluding the debtor's right of set-off;^(q) and at present this certainly is so, at any rate by the combined operation of 7 Geo. IV. c. 46, and 1 & 2 Vict. c. 96.

In a case in bankruptcy,^(r) as well as in one at law,^(s) a strong doubt had been expressed whether the 7 Geo. IV. c. 46, enabled the company to sue at law a member for a debt. But this defect, or supposed defect, has since been remedied by stat. 1 & 2 Vict. c. 96, and the courts have considered the words "shall and lawfully may," in this section, to be obligatory.^(t)

*The public officer is authorized to petition in bankruptcy, by [*469] 12 & 13 Vict. c. 106, s. 92.

Where a member of a banking copartnership kept an account with them as his bankers, and became bankrupt, indebted to the bank on the said account, the company being largely indebted to other persons, they have a right of proof against the bankrupt in respect of the balance due to them on his account.^(u)

Public Officer.—It has been stated to be desirable that the public officer, in suing, should state himself to be so; but this is not always necessary. Thus, where the plaintiff sued as payee of a promissory note, made payable, on demand, in the body of it, "to the manager of the Provincial Bank of England," but the plaintiff did not sue as public officer, it was held that upon proof that he was in fact the manager of the bank named, and of demand on the bank, the plaintiff was entitled to recover; and that in the absence of a plea, that the bank was established under stat. 7 Geo. IV. c. 46, and that the plaintiff was not the public officer of it, it was not necessary for the plaintiff to show that he was the public officer, nor admissible for the defendant to show that he was not so.^(v)

Both the public officers must not sue at once. It will be observed, that by the 9th sect. of 7 Geo. IV. c. 46, actions, &c., "shall and lawfully may be commenced, &c., in the name of any one of the public officers, &c., for the time being of such copartnership as the nominal plaintiff," &c.; if, therefore, both sue together, the court will allow an amendment, on payment of costs, to be made, by striking out the name of one.^(x)

(q) Ex parte Hall, Mont. & Ch. 365, 481.

(r) Id. 365.

(s) Hughes v. Thorpe, 5 M. & W. 656.

(t) 5 Exch. 61, 66; see 1 & 2 Vict. c. 96, s. 1.

(u) Ex parte Davidson, 2 M. D. & De G. 368.

(v) Robertson v. Steward, 1 M. & Gra. 511.

(x) Holmes v. Binney, 6 Scott, 346. As to suing both, 16 M. & W. 669.

*It appears to be evidently the intention of the legislature that [*470] the company should always have a public officer in existence, who may sue and be sued; and if there be no public officer, the company are compellable, probably by *mandamus*, to appoint one, (y) and, moreover, it is clearly settled that the common law remedy against the partners, is wholly taken away; that "shall and lawfully may" are compulsory and exclusive words, as used in this act, the remedies not being cumulative, but in substitution for the common law remedy against partners, (z) and therefore, the common law remedy does not revive against a former partner after the expiration of the three years from his ceasing to be a partner. (a)

In an action by a public officer, it is desirable, though not essential, to allege, in the declaration, that the plaintiff, at the commencement of the suit, (b) had been named and duly appointed one of the public officers of the company; but it is not necessary to state that he is a member of the company, or that he has been duly registered, (c) or that he has been duly named and appointed as the nominal plaintiff on behalf of the copartnership. (d) It may be stated also, that the copartnership was then carrying on business; it is objectionable to state the copartnership to be united *for the purpose* of carrying on business without more, (e) although such statement would not be bad in arrest of judgment. (f)

There seems to be no longer any reason to doubt but that [*471] banking copartnership, since 1 & 2 Vict. c. 96, s. 1, may sue for the price of shares by their public officer. (h)

They may also sue members jointly with strangers, (i) by their public officer.

Notwithstanding the change of name of a copartnership, and the accession of fresh proprietors to it, the increase of their capital, and the addition of fresh directors, the public officer of the new copartnership may sue as a public officer, on a guarantee given to the company before the alteration, (k) it not appearing to the court, from the pleadings or the special case reserved, that the constitution of the bank was different from that with which the contract was made. (l) In no case can a company of this kind sue otherwise than by their public officer. (m)

Also a public officer may sue after a banking copartnership has stopped payment, keeping the establishment open only for the object of winding up the concern. (n)

(y) Per Cur., 10 M. & W. 721; Todd v. Wright, 16 L. J., Q. B. 311; see 6 Exch. 242.

(z) Steward v. Greaves, 10 M. & W. 711.

(a) Barker v. Buttress, 7 Beav. 134; as to being a contributory, Ex parte Hawthorne, 1 Mac. & G. 49.

(b) Esdaile v. Maclean, 15 M. & W. 277; McIntyre v. Miller, 13 M. & W. 725.

(c) Spiller v. Johnson, 6 M. & W. 570. (d) Christie v. Peart, 7 M. & W. 491.

(e) Fletcher v. Crosbie, 9 M. & W. 252.

(f) Davidson v. Bower, 4 M. & Gra. 626; S. C., 2 Dowl. N. S. 115.

(h) This was assumed in Davidson v. Bower.

(i) Manners v. Rowley, 10 Sim. 471. (k) Wilson v. Craven, 8 M. & W. 584.

(l) See 5 De G. & Sm. 733; 12 East, 400.

(m) Chapman v. Milvain, 5 Exch. 61.

(n) Davidson v. Cooper, 11 M. & W. 778. In an action by public officer of a

A banking copartnership having become insolvent, and ceased to carry on business, the public officer instituted a suit in equity, charging some of the directors with losses, during the time when the business was carrying on, by reason of unauthorized speculations in shipping, &c., and of a fraudulent transaction by a deed of arrangement with a debtor to the company, praying relief in respect of all these matters, and to have the deed set aside. - The suit was considered to have been properly instituted by the public officer, although the company had ceased to carry [*472] on business; that directors and trustees, not charged with improper transactions or fraud, need not be made parties to the suit; but the manager, who, it appeared, was mixed up in these transactions, ought to be made a party; and that though there were several distinct transactions, they were properly comprised in a single suit. (o)

So, although a warrant of attorney have been given to trustees of the copartnership to secure a debt due to the bank, the judgment thereon can only be entered up in the name of the public officer. (p)

So the public officer is to sue on a breach of covenant with trustees of the copartnership, to pay calls, (q) and in general, is the only proper party to sue on all covenants in the deed of settlement; although those covenants be made with trustees. (r) The statute 7 Geo. IV. c. 46, it is to be observed, does not expressly authorize the entering into a covenant or bond by the public officer on behalf of the company. (s)

So the company would not be bound by a judgment in an action by a person not at the time their public officer; and hence, if a defendant, in an action purporting to be brought by the plaintiff, as public officer of a company, traverses the appointment of the plaintiff as public officer, and has a verdict on that issue, it is a full defence. (t)

Liabilities of Public Officer.—The indemnity given by the statute to the public officer, as regards actions, judgments, &c., against him, has already been pointed out. (u)

With respect to the production, for purposes of evidence, by the public officer, of papers and documents in his custody *belonging to the company, his responsibility is very large. The legislature, it [*473] must be remembered, has expressly enacted, that every decree or order of a court of equity, against any public officer of the company, shall have the same effect as if all the members were parties to the suit.

Therefore, the public officer, in case of any proper application for the discovery of matters contained in the books, documents, &c., of the company, cannot allege that the company is dissolved, and since that event he had not in his individual possession any books, &c., of the company,

banking copartnership, plea denying that at the commencement of the suit the copartnership were carrying on the business of bankers, allowed with pleas of non assumpsit and accord and satisfaction, *Roe v. Fuller*, 21 L. J., Exch. 104; S. C., 7 Exch. 220; see 11 M. & W. 63; 5 id. 656; 10 id. 711.

(o) *Harrison v. Brown*, 5 De G. & S. 733, cor. Parker, V. C.

(p) *Bell v. Fisk*, 12 C. B. 493.

(q) *Wills v. Sutherland*, 4 Exch. 211.

(r) *Chapman v. Milvain*, 5 Exch. 61; see 12 C. B. 498.

(s) *Per Jervis*, C. J., 12 C. B. 497.

(t) *Barnewall v. Sutherland*, 19 L. J., C. B. 292.

(u) See *supra*, p. 467.

but that he believes some of them were in the possession of the directors, and others of the solicitor of the company; and the reason he cannot do so is the above. The public officer stands for the whole body: if the whole body had been defendants, they could not have refused to produce, in a suit by a shareholder charging insolvency, and praying a dissolution of the company, and an account, &c., so neither can the public officer.

A covenant in the deed of settlement, to the effect that no shareholder, not being a director, &c., &c., shall be entitled to inspect any deeds, books, &c., of the company, &c., does not vary the case, or deprive the books of their character of evidence, as between the shareholder and the company, or oust the court of its power to enforce the production of such evidence.^(x)

In fact, in many respects, for the purpose of supporting and maintaining proceedings on behalf of the company, and enforcing their claims, recovering debts, &c., the public officer is nearly in the nature of a corporate body,—an abstract entity having a continuous duration, independent of any change that may be made in the living being, or individual, who fills the office. This appears to be the meaning of the statute, in providing that the public officers, for *the time being*, notwithstanding death, removal, &c., may take proceedings, and commence, prosecute, [*474] and continue suits, *&c. Thus, a *cognovit actionem*, given to A. B., as public officer of a copartnership, was considered to be sufficient, after his removal, to authorize a succeeding public officer to enter up judgment in his own name.^(y) To enter it up in the name of the officer, in whose time the *cognovit* was given, would be erroneous.^(z)

Again, when an action is brought against the public officer of a copartnership, as such, he is not allowed to plead that he has become bankrupt; for he is a mere parliamentary defendant; he represents the interests, perhaps, of several hundred persons, and, if he were to be allowed to plead such a plea, of a matter merely personal to himself, in bar of the action, he would confer the benefit of that defence on all those whom he represents as defendant but as a mere name, and such an effect, of setting up the public officer to be sued on behalf of the body, it is manifest the legislature could not have contemplated. In such a case, however, the plaintiff would be prevented from taking out execution against the defendant, or his individual estate.^(a)

Accordingly, it has been held, where a deed of settlement provides, that if any of the public officers became bankrupt he should become disqualified, and his office should become vacant, that the proper construction is, not that the person should cease to be public officer absolutely, but only at the election of the company.^(b) If bankruptcy, *per se*, disqualified, the company could have had no election.

So, a person sued, as public officer of a copartnership, will not be

(x) Hall v. Connell, 3 Y. & Coll. 707, Exch.

(y) This seems to be the effect of the judgment in Webb v. Taylor, 1 Dowl. & L. 676; see Todd v. Wright, 16 L. J., Q. B. 311.

(z) See 1 D. & L. 687; Probin v. Locock, 1 Dowl. N. S. 197.

(a) Steward v. Dunn, 11 M. & W. 63; see 5 De G. & S. 733.

(b) Steward v. Dunn, 12 M. & W. 655.

allowed to plead that he is not public officer, *together* with other pleas, going to the merits of the action. He may rely on that plea as his sole defence, if he chooses; but, as the company are the true defendants, they must rely on such defence as they have to the substance of the action; *they cannot be allowed to turn the plaintiff round on so mere a matter of form as whether the defendant was public officer at the commencement of the suit.(c)

The above sect. 9, of the stat. 7 Geo. IV. c. 46, has been said to show very clearly the intention of the legislature, that no action should be brought except against the public officer;(d) it would seem, therefore, to follow, that the company are bound always to have a public officer who is capable of being sued.

Where, however, the litigation is by one or more members of the copartnership, as such, and the other members, as such, the public officer is improperly made a party to the suit as defendant; for, where one member charges fraud against the other members with which the whole company was not chargeable, it is inconsistent with the character of the public officer's function, and the object of the legislature in instituting it, to make him a defendant, since he only represents the company, and here the company are not called upon to answer as such. It is to be observed, however, that this suit was brought after the company was dissolved, and after the debts were paid off, and, practically, the banking business had terminated.(e) But it does not appear, that the absence of these facts would have made any difference in the decision.

The stat. 7 Geo. IV. c. 46, relates in this respect, to banking copartnerships of more than six members, carrying on business *beyond* sixty-five miles from London: the stat. 7 & 8 Vict. c. 113, s. 47, extends the power of their suing and being sued, to banking copartnerships of more than six members, carrying on business *within* that distance of London.

*By the stat. 3 & 4 Vict. c. 111, s. 2, in all cases of banking copartnerships, under 7 Geo. IV. c. 46, and also those under 3 & 4 Will. IV. c. 98, the members are liable for stealing the goods of the company, or in respect of fraud, forgery, &c., against the company, to criminal proceedings, "in the name of any of the officers, for the time being, of any such copartnership, in whose name any action or suit, might be lawfully brought against any member," for every such fraud, &c.(f)

Death of Public Officer.—John Taylor, as public officer of a banking copartnership, commences an action, in which issue is joined; after which, and before trial, he dies; and the Nisi Prius record, and all the proceedings, were made up and taken, as though Taylor were still alive, and no notice was taken on plea roll of the death of Taylor, or of the

(c) *Needham v. Law*, 11 M. & W. 400. Since 1 & 2 Vict. c. 96, a banking copartnership is so far in the nature of a corporation that notice to one member is not notice to the body; see 12 M. & W. 664; 3 C. B. 25.

(d) *Davison v. Farmer*, 6 Exch. 242.

(e) *Seddon v. Connell*, 10 Sim. 58, 79.

(f) Made perpetual, 5 & 6 Vict. c. 85.

appointment of his successor; but, after the *Nisi Prius* record was passed, so made up, a memorandum was entered on it of the death, and of the new appointment, not by way of suggestion, nor followed by confession of the defendant, or a *nient dedire*. The cause was then entered for trial in the name of the new public officer as plaintiff, and was tried by a jury, returned under a *venire*, awarded between Taylor and the defendants. Defendants appeared under protest, and plaintiff had a verdict; but it was held, that the entry on the *Nisi Prius* record was irregular, and did not authorize the trial of the cause in the name of the new public officer.(g)

This seems to turn on the technical ground of the maintenance of the ancient forms; it being a rule, that, except where a statute expressly dispenses with it, in all cases where there is a change of parties during the progress of the cause before trial, that change is required to appear [*477] on the record, by way of suggestion to the court, and that where such facts are not traversable, they should be followed by a confession, or a *nient dedire*.

The proper course seems to be, to move for a rule *nisi*, to enter a suggestion, with a *nient dedire*.(h)

In a case, the public officer had died after judgment, and, after the issuing of a writ of *ca. sa.*, but before its execution, this does not cause the action, or the proceedings consequent on it, to abate, and, therefore, the defendant may be taken in execution.(i)

Banks within Sixty-five Miles of London.—With respect to powers of suing, and being sued, it is material to attend to the provisions of the statute 7 & 8 Vict. c. 113, by which every company of bankers, of more than six persons, established on 6th May, 1844, for carrying on business *within sixty-five miles from London*, and not falling within 7 & 8 Vict. c. 113, is given the same powers of suing, and being sued, in the name of the public officer, &c., as a copartnership, under 7 Geo. IV. c. 46, has, by that act,(k) which relates to partnerships carrying on business *beyond sixty-five miles from London*; provided that the first-mentioned companies make out and deliver, from time to time, to the Board of Inland Revenue, the returns required by 7 Geo. IV. c. 46, all the provisions whereof, respecting returns, are to apply in the case of such bankers also.(l)

Own Members.—These bodies, as has been observed, may always sue their own members; and it is enacted :(m)—

“*Pleas.*—That in case the merits of any demand by or against any such copartnership shall have been determined in any action or suit by or against any such public officer, the proceedings in such action or [*478] suit may be pleaded in bar of any other action or suit by or against the public officer of the same copartnership for the same demand.”

(g) *Barnewall v. Sutherland*, 19 L. J., C. B. 290; S. C., 14 Jur. 720, per Cur.

(h) *Paterson v. Ironside*, 14 Jur. 722, n., per Cur. C. B.

(i) *Todd v. Wright*, 16 L. J., Q. B. 311, cor. Erle, J.; *Ellis v. Griffiths*, 16 M. & W. 106.

(k) See *supra*, p. 454, s. 1.

(l) 7 & 8 Vict. c. 113, s. 47.

(m) 1 & 2 Vict. c. 96, s. 2.

Set-off.—Then follows an important and remarkable enactment, respecting set-off.⁽ⁿ⁾

“That no claim or demand which any member of any such copartnership may have in respect of his share of the capital or joint stock thereof, or of any dividends, interest, profits or *bonus*, payable or apportionable in respect of such share, shall be capable of being set off, either at law or in equity, against any demand which such copartnership may have against such member on account of any other matter or thing whatsoever; but all proceedings in respect of such other matter or thing may be carried on as if no claim or demand existed in respect of such capital or joint stock, or of any dividends, interest, profits, or *bonus*, payable or apportionable in respect thereof.”

Then, by 5 & 6 Vict. c. 85, these enactments were made perpetual.

The result is, that the company can only sue, in any case, including a suit or action against a member for a debt, or to enforce any claim or demand, by their public officer,^(o) and the public officer is the proper party to sue for calls, though he himself is not a party to the deed in which the defendant covenanted to pay the calls.^(o)

Effect of Judgments, &c.—Then provision is made, that decrees in equity, made against the public officer, shall take effect against the company,^(p) and so of judgments in actions at law.^(q)

If a judgment be recovered against the public officer of a banking copartnership, and it be desired to charge the real estate of a member of the copartnership at the date of the judgment, the Court of Common Pleas has no jurisdiction over the senior master, to order him to receive the memorandum, in order to register the judgment, pursuant to 1 & 2 Vict. c. 110, s. 19, and 3 & 4 Vict. c. 82, s. 2; but the [*479] *master will probably receive such memorandum, and register the judgment in ordinary cases. The question is for his discretion.^(r)

If the property consist of land, then, although an *elegit* has been issued against it, still, if the land be found insufficient in value to satisfy the judgment debt, the creditor may proceed against the members.^(s)

Judgment was entered up (under a power of attorney,) by a banking copartnership, against the public officer of another banking copartnership, and a *sci. fa.* issued, to obtain execution against several members of the latter. One of these obtained a rule *nisi*, for setting aside the judgment and warrant of attorney, and permitting certain named members to defend the action. The court, thereupon, ordered an issue to be tried upon the question, *inter alia*, whether the members, or shareholders of the latter company, were indebted to the former, in any, and what sum: held, that on such issue, the defendants could not object, that some parties on the record were members of both companies; for, though it be true, that in an *action*, the same person cannot be plaintiff and defendant,^(t) this rule does not apply to an *issue*, directed for the purpose of

(n) 1 & 2 Vict. c. 96, s. 4.

(o) Chapman v. Milvain, 5 Exch. 61.

(p) 7 Geo. IV. c. 46, s. 11.

(q) Id. s. 12.

(r) Ex parte Ness, 5 D. & L. 339; S. C., 5 C. B. 155; 2 & 3 Vict. c. 11, s. 8.

(s) Reg. v. Derbyshire, &c., Railway Company, 23 L. J., Q. B. 333.

(t) Bosanquet v. Wray, 6 Taunt. 587.

ascertaining certain facts, with a view to ulterior proceedings, for there is no reason why, in such case, the court should not, for that special object, vary the legal position and rights of the parties, as in issues, directed by the Court of Chancery, is constantly done.^(u)

Execution.—The next provision is very material, as giving the mode of realizing a judgment against the company, in case there are no partnership assets to meet it; it has led to many questions; and the courts [*480] have had great trouble in *putting an interpretation on it. The enactment^(x) is so important, to be fully known, that it is necessary to state it at length:—

“That execution upon any judgment in any action obtained against any public officer for the time being of any such corporation or copartnership, carrying on the business of banking under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members, *for the time being*, of such corporation or copartnership; and that in case any such execution against any member or members *for the time being* of any such corporation or copartnership, shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer *for the time being*, to issue execution against any person or persons who was or were a member or members of such corporation or copartnership at the time when the contract or contracts, or engagement or engagements, in which such judgment may have been obtained, was or were entered into, or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained :

“Provided always, that no such execution as last mentioned, shall be issued without leave first granted on motion in open court, by the court in which such judgment shall have been obtained, and when motion shall be made on notice to the person or persons sought to be charged, nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or copartnership.”

The reader ought to bear in mind, that there is great difficulty in construing this statute. Both courts of law and equity^(y) have experienced embarrassment, in acting on the statute. Its enactments have been found, by judicial authority, to be inconsistent with each other, and not entirely intelligible. The first section appears to create a several liability on the part of the several members, to pay all bills and notes issued by the company, and all sums borrowed, and owed by the company; and it has been frequently noticed, that this clause extends the ordinary liability. There is nothing to take away the liability, which, in equity, would [*481] *attach to the assets of a deceased partner, who is a party to the contract.

The 11th section relates to decrees of courts of equity, recovered

(u) *Bosanquet v. Woodford*, 5 Q. B. 321.

(x) 7 Geo. IV. c. 46, s. 13.

(y) See *Barker v. Buttriss*, 7 Beav. 134; *Ricketts v. Bowhay*, 3 C. B. 900; see also 3 Mac. & G. 200-203.

against the public officer. We may observe, that it is difficult to reconcile the provisions, as to decrees in equity, with those as to judgments at common law. A decree of a court of equity may be a simple order to pay money, as simple as a judgment of a court of law. By the 11th section, a decree for payment of money, is to be enforced on every, or any member of such copartnership, in the same manner as if they were parties before the court. The very special provisions of the 13th section, are not to be found in the eleventh, as applicable to a decree, which is to result in the payment of money.

By the 13th section, execution is first to be issued against any member, or members, for the time being, of the copartnership; that is, who are partners at the time of the execution; and, in case that should be ineffectual, for the purpose of obtaining satisfaction, then execution may be issued against certain persons, who have ceased to be members before that time. This section provides only the mode of issuing execution against those persons who are liable at law. If the assets are liable in equity *only*, this clause contains no means by which that liability may be enforced. It appears, however, that it does not follow, that there is no liability in equity. The state of the law, and the previous sections of the act, appear to show, that there is to be a liability in equity; and if that be so, that liability must be enforced, according to the ordinary principles of the Court of Chancery, because there is nothing about it in the clause, pointing out how a judgment at common law is to be enforced against the parties legally liable.

In asserting an equitable claim against the assets of a deceased partner, however, it seems that regard must be had to those provisions of the act, which would have been *applicable, if it had been a legal liability, according to the view expressed by Lord Langdale, in a [*482] case arising on this act.(z)

The object of the 13th section is, to provide a mode of first rendering liable the funds of the partnership, which are primarily applicable to discharge the debt, by issuing execution against those who have the control over those funds in the first instance, and execution is not to go against those who have no control over the funds, until the resources of the first class have been found not to be available. Hence, on an application in equity, to enforce the equitable liabilities of a deceased partner, in the same way as though he had ceased to be a member by transfer, the liability must first be shown not to be capable of being satisfied by proceedings against those who were members at the time.(a)

Upon these two sections, viz. ss. 12, 13, it is to be remarked, that three modes of carrying into effect a judgment obtained against a public officer, are given according to circumstances.

Execution may be had upon the joint property of the body, or upon the individual property of each, or any number, or any one of the members, for the time being; or *in case such recourse be ineffectual*, to satisfy

(z) *Barker v. Buttress*, 7 Beav. 134; see *Ricketts v. Bowhay*, 3 C. B. 900, where it was doubted whether recourse could be had at law against estate of deceased member.

(a) *Heward v. Wheatley*, cor. *Parker*, V. C., 5 De G. & S. 552.

the amount due on the judgment, then execution may be had against the individual property of all, or any of such persons as were members at the time when the contract was entered into, or became members before the date of the contract, or were members at the time of obtaining judgment, provided that no person be liable for more than three years, after he has ceased to be a member.

At length it is well settled, in the case of judgment obtained against [*483] a public officer, that the proper mode of proceeding *to execution against any other member is, by way of scire facias, and not by suggestion on the roll.(b)

When it is desired to issue execution against the public officer himself, no scire facias is necessary.(c)

Otherwise the plaintiff must proceed by sci. fa. on the judgment, against a member, or members, for the time being, of the copartnership. In such case, the person on whose goods it is intended to proceed by sci. fa. to execution, must be ascertained to be an *actual* member of the company; in one case, a person was held not to be a shareholder in a company, although the statute constituting the company stated him to be so; but this was under peculiar circumstances.(d)

Again, where the deed of settlement of the company requires certain acts to be done, by persons marrying female shareholders, and certain other acts to be done by executors of deceased shareholders, before they can respectively become members of the company; it is necessary to make parties liable on scire facias, as husbands, or executors, that they be shown to have performed the prescribed acts.(e)

So, where the deed of settlement stated that every transferee of shares, who is not already a member of the company, was thereby to become a member of the company as to obligations, but not as to benefits, until he executed the deed of settlement; and also stated that a transferee of shares, who had previously executed the deed of settlement, was to become a member in respect of the transferred shares, from the date of the transfer, without again executing a deed, and a purchaser of shares executed a deed, transferring from the vendor to himself the shares, the purchaser thereby covenanting with the vendor, and with the public [*484] officer of the *company, to pay all instalments, &c., and also to perform, and keep all the covenants and stipulations of the deed of settlement, &c. and, if required by the directors to execute a deed of covenant to the trustees, or public officer, to observe all regulations affecting holders of shares in the company; still, it was held in equity, that the execution of this deed of transfer was not constructively, or in substance, an execution of the deed of settlement; that the purchaser might be a specialty debtor to the company, against whom they might rank, under the Winding-up Act, (1848,) as specialty creditors; but that such execution did not make him a member as to benefits.(f)

(b) *Ransford v. Bosanquet*, 2 Q. B. 972. See 10 M. & W. 719, 720.

(c) *Harwood v. Law*, 7 M. & W. 203.

(d) See *Scott v. Berkeley*, 11 Jnr. 242; S. C., 16 L. J., C. B. 107.

(e) *Dodgson v. Bell*, 5 Exch. 967; *Ness v. Armstrong*, 4 Exch. 21; *Ness v. Bertram*, id. 195; *Ness v. Angas*, 3 Exch. 805.

(f) *Hay v. Willoughby*, 10 Hare, 242; cor. *Turner, V. C., Wightman, J.*, explaining *Re Straffon's Executors*, 1 De G., M. & G. 577.

Shares, and Shareholders.—Again, where the deed of settlement defined *shareholder*, and *member*, to mean the owner of a share, or interest in the capital, and joint stock of the company; and provided that the shares should be transmissible to personal representatives, but no executor should, *as such*, be a member, but that every executor might either sell his testator's shares, or constitute himself a member, in respect of them, by a mode pointed out by the deed, and that the directors might declare the shares forfeited, in case executors did not constitute themselves members, and the deed provided for the payment of calls by *shareholders*: there, a transferee of shares having covenanted in the transfer deed with the trustees of the company, to perform the stipulations of the deed of settlement, died, and his executor took no step to become a member; in an administration suit against the executor, it was held that the company were entitled to prove as creditors, in respect of a call made after the death; for, that under the provisions of the deed in question, executors were placed in the position of **holders* of shares in the company, although not having all the rights which belong to an *[*485]* owner of shares.*(g)*

In scarcely any case can a person, once regularly a shareholder, and member of a company, disprove his being still so, as alleged in the seire facias, except by showing a regular transfer in the manner required by the deed of settlement.*(h)*

Throughout the statute, mention is made of shares, and shareholders, and the idea of shares seems, in popular estimation, to be inseparably connected with idea of a banking copartnership.

Shares, however, (it has been laid down,) are not necessarily a part of the constitution of a banking copartnership, under 7 Geo. IV. c. 46. It does not appear to be at all necessary, that their capital should be divided into shares; although trading, and other companies, with letters patent, but not incorporated, carrying on business under the provisions of 7 Will. IV. & 1 Vict. c. 73, must have their capital divided into shares, and transferable; and it is not that such a banking copartnership has its capital divided into shares, that would alone make it a "public company," within the meaning of 1 & 2 Vict. c. 110; it might, and would be such a public company, without any such division into shares; because the attributes of publicity would still exist—the return of the names and places of abode of the members, from time to time, and of the officers appointed to sue, and be sued, on behalf of the company.*(i)* There is a further attribute of publicity conferred by the later statute, 7 & 8 Vict. c. 32, s. 21,*(k)* which obliges banking copartnerships to make returns annually to the Inland Revenue Office, of **the name, [*486]* residence, and occupation of every partner, which return must

(g) Heward v. Whentley, 3 De G., M. & G. 628, 646; see Pentland v. Gibson, 1 Alc. & N. 311.

(h) Bosanquet v. Shortridge, 4 Exch. 699; see Ex parte Hall, 1 Mac. & G. 307; and per Ld. St. Leonards, 5 H. Lds. 323, animadverting on Bosanquet v. Shortridge.

(i) 1 Sim. (N. S.) 239. As to not keeping share register book, see Bagge's case, 20 L. J., Ch. 229.

(k) See supra, p. 444.

be published once a year, in a newspaper circulating in the town or county within which the bank is situate. This, however, applies to every partnership of bankers.

Shares in a banking copartnership are shares in a "public company," so as to be chargeable by judge's order, in case of a judgment recovered against the owner of them, within the 14th section of 1 & 2 Viet. c. 110, which empowers a judge at chambers to grant an order, charging stock, shares, &c., in public companies, whether incorporated or unincorporated, &c., provided that nothing shall be done, to have the benefit of such charge, within six months from the date of the order. The effect of the charge is to be the same, as if the judgment debtor had charged the shares.^(l)

In truth, there is no such legal term known as a "public company" not incorporated; and, it has been considered, that banking copartnerships established under 7 Geo. IV. c. 46, and 3 & 4 Will. c. 98, formed one class, and companies associated for trading and other purposes, having letters patent granted by the crown, under 7 Will. IV. & 1 Viet. c. 73, but not incorporated, formed the other class, of unincorporated companies, to which alone the term public company could be applicable, at the time of the passing of 1 & 2 Viet. c. 110, and the former class appears to be within the meaning of the statute; all the attributes of publicity appear to exist in the one case, as in the other.^(m)

A clause in the deed of settlement, making the approbation of the directors necessary to the sale of shares, has no effect of *itself*, to limit the assignability of shares; in practice, the shares are transferable,⁽ⁿ⁾ notwithstanding.

[*487] *Still, there can be no doubt, it is conceived, that the directors may in such case, refuse their approbation to any proposed transferee, and so prevent the contemplated transfer at their discretion, which cannot be impeached by any proceeding at law, since the legislature has in effect, invested them with it, by not ordering that the shares shall be transferable, and by ordering that the duties of the directors shall be limited by the deed; and, it seems, the company, the intended transferee, and the transferor, would be each alike without any means of punishing the directors for withholding their approbation, unless *mala fides* could be shown.

Shares, as has been observed, may be charged by a judge's order, under 1 & 2 Viet. c. 110, s. 14, with a judgment debt; although the deed of settlement provide, "that the shares should not be transferable, except by the consent of the directors:" also, "that if any order or decree was made against any proprietor, by which his shares became charged, they should be forfeited to the company." This appears, from a case where the company was not registered, under 7 & 8 Viet. c. 110,

(l) 1 & 2 Viet. c. 110, s. 14; per Parke, B., *Graham v. Connell*, 19 L. J., Exch. 362. As to bank stock, see *Grainger v. Slingsby*, 25 L. J., Chanc. 573.

(m) *McIntyre v. Connell*, 1 Sim. (N. S.) 237, 238; *Ld. Cranworth, V. C.*, *Graham v. Connell*, 19 L. J., Exch. 361.

(n) Per Parke, B., *Graham v. Connell*, 19 L. J., Exch. 362; see the clause, 1 Sim. (N. S.) 228.

but was empowered to sue and be sued, by public officer, under 7 Geo. IV. c. 46, and 7 & 8 Vict. c. 113, s. 47,^(o) and where the Court of Exchequer, holding it to be somewhat doubtful, whether the body was a "public company,"^(p) within the meaning of 1 & 2 Vict. c. 110, refused to set aside a judge's order, which had been made.^(q) However, the same company, the Union Bank of London, has since been held by Lord Cranworth, V. C., to be a "public company," within the statute 1 & 2 Vict. c. 110,^(r) and the law may be considered to be clear, that shares in similarly constituted companies, are chargeable.

*Hence shares in all copartnerships, &c., under 7 Geo. IV. c. 46, are chargeable in like manner; for as the 7 & 8 Vict. c. [488] 113, s. 47, directs all judgments, &c., to be enforced in like manner, as in case of such companies carrying on business *beyond* sixty-five miles from London, and the shares of companies carrying on business *within* sixty-five miles from London, are decided to be chargeable, it is evident the others are so also; or, in other words, all shares in these bodies are chargeable. However some obscurity is cast over the meaning of the clause by reason of the proviso—that the company shall make out, &c., the several returns required by 7 Geo. IV. c. 46.

Also, in equity, a second incumbrancer on shares, the prior incumbrancer being, *ex. gra.*, the company, who has a lien or charge on the shares, may by a bill properly framed, as to the persons brought before the court, and praying an account, &c., have means to redeem the first—indeed, that is his right—and to have all the securities held by the first assigned to him.^(s)

A testator at his death held a number of shares in a banking copartnership, called "The Northumberland and Durham District Banking Company." The shares were 10*l.* shares, and the testator had paid up two instalments of 2*l.* 10*s.* per share, being all that had, up to the time of his death, been called for by the directors. On 10th October, 1843, the testator died, devising all his shares to legatees, who were infants. 8th April, 1845, the executors caused the shares to be transferred into their names, assenting to the legacy, and on 3rd May, 1847, paying 309*l.* 15*s.* as legacy duty. They also received a dividend of 2,065*l.* upon the shares. In October, 1848, the remaining 5*l.* per share is called up by the directors; this the executors paid, and afterwards received further dividends. Then the question was, whether the legatees of the shares, or the residuary legatees, ought to bear the burden of the call of 1848.

*Now, in this case, by the provisions of the deed of settlement, [489] the testator's estate was not liable to the call of 5*l.*, at the time it was made; for, although by the deed of settlement, that estate was at the

(o) See *supra*, p. 475. It was not a company constituted under 7 & 8 Vict. c. 113; its shares were 50*l.* shares; that statute requires, s. 2, the shares to be not less than 100*l.* each. See 1 Sim. (N. S.) 225.

(p) See 1 Sim. (N. S.) 233, as to meaning of these words.

(q) *Graham v. Connell*, 19 L. J., Exch. 364; S. C., 1 L. M. & P. 438; see *Morris v. Manisty*, 7 Q. B. 674.

(r) *M'Intyre v. Connell*, 1 Sim. (N. S.) 225.

(s) *M'Intyre v. Connell*, 1 Sim. (N. S.) 256.

time of the call liable to such call, whenever it should be made, yet before it actually was made the shares had been transferred into the names of the executors, and by another provision of the deed, the liability did not continue longer than until the shares should have been transferred out of the testator's name, into that of some other person. By this transfer the executors made themselves trustees for the infant legatees, who, on attaining twenty-one, adopted the act, and claimed the legacy. Now the effect of this was precisely the same as if the shares had been at that time transferred to other persons, in trust for the legatees, or as if, the legatees having already attained twenty-one, the transfer of the shares had been made at once to them.

As regards the company, the executors, by the transfer into their own names, have become shareholders, that is to say, they became personally liable to pay the call to the company, whether the testator's estate was solvent or insolvent. The assets of the testator were no longer liable to make that payment. Under the deed in question the directors having permitted the transfer, the estate of the testator was thereby discharged from all further liability, however ample that estate might have been, and the executors personally might have been unable to discharge it.

Then, as between the persons interested under the testator's will, the call must be borne by the specific legatees of the shares; for the payment of the call could not have been enforced by the company against the general personal estate of the testator, and there is no intimation of a contrary intention in the will.

If this result were not adopted, it would seem to follow that if the testator had specifically bequeathed to one who got them transferred into his own name, and the company afterwards failed, and thereby [*490] contribution was required in respect of the shares, then, that in such case, the testator's general personal estate would be liable to pay such contribution.

The same, it is to be observed, would have been the result, if the shares had not been transferred to the executors, for the testator's interest in the subject matter of the bequest was complete at the time of the death, and the future calls must fall on the legatee, who takes *cum onere*, unless the will shows a contrary intent; if, however, the last-mentioned call had been contemplated before the death, and it had been required to make his interest in the shares complete, *ex. gra.* if the further call were required before the company could be worked, or before any dividend could be paid, then the general personal estate of the testator ought to have borne the expense of the call. The transfer to the executors is immaterial in this view.^(t)

In a case of an ordinary banking copartnership—as, for instance, one of six partners—if one becomes bankrupt, no liability can arise against him or his estate, in respect to the trading as bankers, *after* his bankruptcy: in case of a banking copartnership, of more than six partners, to which the Winding-up Acts apply, matters stand somewhat on the same ground. The shares in it are not property, as the shares in an incor-

(t) *Armstrong v. Burnet*, 24 L. J., Chanc. 473.

porated joint stock company of any description of trade are, but constitute an interest determinable on bankruptcy, and consequently a bankrupt member's name cannot be put on the list of contributories on the winding up, in respect of liabilities incurred subsequently to his bankruptcy.^(u) But in neither incorporated nor unincorporated companies of this kind are the shares interests in land.^(x)

*A contract for the sale of shares in a banking copartnership in ordinary circumstances, is not a contract for the sale of "goods, [*491] wares, or merchandize," within the 17th section of the Statute of Frauds, so as to require a written memorandum.^(y)

The power of attorney to sell, &c., shares, does not, without express words, give authority to pledge; it is indispensable that a person who is asked to take a pledge of shares, in such circumstances, should ascertain whether the power includes pledging; if not, he cannot safely enter upon the transaction.^(z)

Executors.—The following decision deserves the careful attention of directors and officers of copartnerships in banks, who wish for guidance as to their duties towards executors and administrators, in respect of shares.

A., by his will, gives to trustees, their executors, &c., all his personal estate, &c., upon trust, to invest one moiety, and permit the dividends and profits thereof to be received by his wife, Mercy A., during viduity, &c. Part of this moiety was invested, in the name of Mercy A., in the purchase of shares in a banking copartnership. Mercy A., remaining a widow, died intestate. Administration was taken out by B., the surviving executor under the husband's will, and stamp duty was paid sufficient to apply to the whole of the testator's personal estate. Then B., in his double capacity of executor and administrator, requests the banking company to register the letters of administration in their books, and to transfer the shares and pay the dividends to him. This, however, the bankers refused to do, and requiring the luxury, as was said, of judicial *indemnity, became involved in a suit in chancery, the result of [*492] which was that they were obliged to do at last what they had at first refused to do, and also to pay the costs of the suit, the master of the rolls observing, bankers are not required to take notice of trusts; they may require an affidavit of the fact, under 48 Geo. III. c. 149, ss. 35, 36, 37, but they are not to inquire whether the affidavit is true. They are to make the transfer, it seems, at all events.^(a)

In case of a banking copartnership, the deed of settlement of which provided that the executor of a deceased shareholder should not be a

(u) Greenshield's case, 5 De G. & S. 599; see *Myers v. Perigall*, 2 De G. M. & G. 599, cor. Ld. St. Leonards, C. As to shares in incorporated company, *Edwards v. Hall*, 25 L. J., Chanc. 85, cor. Ld. Cranworth, C.

(x) 25 L. J., Chanc. 86.

(y) *Humble v. Mitchell*, 11 A. & E. 205; see 1 Exch. 858, 859. When in "order and disposition" of bankrupt, see 12 Cl. & F. 777; 2 Sim. & S. 292.

(z) *Duncuft v. Albrecht*, 12 Sim. 199; see 5 Hare, 242. As to stamp on transfer of shares in incorporated companies, Sweet, Supplem. Bythew. Convey. 274; see 2 Q. B. 321.

(a) *Hennell v. Strong*, 25 L. J., Chanc. 407.

member of the company in respect of such shares, but should be at liberty to sell them, or, at his option, to become a member, on complying with certain terms, and that if he did not become a member, he should not be entitled to any dividend in respect of such shares, accruing after the death of the testator; the executor, not having complied with the terms above referred to, was held not to be a member for the purpose of execution going against him by *sci. fa.* on judgment against the public officer, although he had actually received a dividend which accrued due after the death. *(b)*

Precisely the same principle governs the case of the husband of a female shareholder, where the deed of settlement requires that he shall go through certain forms, or do acts, previous to becoming a member: then he is not a member if he has not done those acts, so as to be liable to execution under a *sci. fa.*; *(c)* that is, the wife remains the member, [*493] notwithstanding the coverture, *(d)* and may sue for the dividends and recover, unless there be a plea in abatement. *(e)*

It appears to be clearly held in equity, however, that the terms of the deed of settlement may be such that a partner may, by covenanting that his executors shall perform all things, with respect to his shares, that he would have been liable to perform in his lifetime, bind his executor in equity; that is to say, may render his estate liable in equity, to contribute to the debts of the copartnership. *(f)*

Where shares were specifically bequeathed to infants, and were transferred into the names of executors, and several years afterwards a call is made, it was held that it must be paid by the legatees, and not out of the testator's residuary estate. *(g)*

Mortgage.—A transfer, by way of mortgage, having been made of shares in a banking copartnership, the mortgagor afterwards pays off the debt and applies for a retransfer of the shares; but the directors did not permit the retransfer to be made. In the meantime, a creditor recovered judgment against the public officer, and threatened execution against the mortgagee, as one of the shareholders.

A court of equity held, that where the mortgage was made simply as an absolute transfer, subject to redemption, and nothing had passed, binding the mortgagor to take a retransfer of the shares, the mortgagor was not liable to indemnify the mortgagee against debts incurred after the transfer made on the mortgage, and before the debt was paid off;

(b) *Ness v. Armstrong*, 4 Exch. 21; see 4 Exch. 195. Nor is he liable as a contributory under the Winding-up Acts. *Angas's case*, 1 De G. & S. 560; see 5 Exch. 979; *Pentland v. Gibson*, 1 Alc. & N. 311.

(c) *Ness v. Angas*, 3 Exch. 805; see 4 Exch. 26; *Dodgson v. Bell*, 5 Exch. 967, in Exch. Ch. As to being contributory under Winding-up Acts, see *Burlinson's case*, 3 De G. & S. 18; *Kleight's case*, 3 De G. & S. 210; *Gouthwaite's case*, *id.* 258; see 5 Exch. 979. The 13th sect., limiting the liability of partners to three years after ceasing to be so, has no effect in varying the liability to contribute between the partners *inter se*. *Gouthwaite's case*, 3 Mac. & G. 187.

(d) *Per Jervis, C. J.*, 22 L. J., C. B. 177; as to contribution, *Sadler's case*, 3 De G. & S. 36.

(e) *Dalton v. Midland Counties Railway Company*, 22 L. J., C. B. 177.

(f) See 3 Mac. & G. 199.

(g) *Armstrong v. Burnet*, 20 Beav. 424.

but that the mortgagor here having paid off the mortgage, and elected to take the retransfer of the shares, the mortgagee became a trustee of the shares for the mortgagor, *and the mortgagor was bound to indemnify him against the whole expenses, or liabilities, which [*494] he had properly incurred, by holding and maintaining the shares. That the mortgagor, indemnifying the mortgagee, in respect of the costs, was entitled to take proceedings in the name of the mortgagee, to compel the retransfer of the shares, and to resist the proceedings against the shareholders under the judgment.

The mortgagee, in such case, does not appear to have any right, at law, against the mortgagor.

It was admitted, in the case, that the company was insolvent, and the shares comparatively valueless. (h)

Lien.—Where a deed of settlement of a banking copartnership stipulated, that the company should have a lien on the shares of such proprietors as were customers and indebted to the bank, and that no share should be transferred without the consent of the directors; and an abstract of these provisions was indorsed on the certificate of the share held by each proprietor; and a proprietor of shares became bankrupt, being largely indebted to the bank for advances; the shares were held not to pass to his assignees, as being in the reputed ownership of the bankrupt, so as to defeat the lien of the bank, as provided for in the deed. (i)

So, when the stipulation was, that the directors should have a lien on the shares and stock of every shareholder, for debts due from him to the company, and that the directors might cancel and declare forfeited, or sell the shares of such shareholder, or otherwise deal with the same, as the case might require, for obtaining payment of such *debts; the bank was considered to have a lien, not only on the shares, but [*495] also on the dividends, of a shareholder, who had overdrawn his account with them as a customer, (k) and the notice of dividends, which was to be given by circular letter, addressed to each of the shareholders under the deed, did not, when sent to the customer in question, operate as a waiver, on the part of the company, of their rights, because such notice was to be sent, by the terms of the deed, to all, without reference to the state of their relations to the company at the time.

It would have been so, without any express provision in the deed, provided there had been nothing in it to show an opposite intention; for that would have been the case in a common partnership, where one partner has a lien upon all that another partner has a right to receive, and, without an intention that this should not be the case manifested in the deed, the ordinary rule, as to partnerships, would apply, in this respect, to a banking copartnership, under 7 Geo. IV. c. 46.

A trustee invests part of the trust fund, in the purchase of shares of a

(h) *Phene v. Gillan*, 5 Hare, 1. As to specific performance of agreement to purchase, *Shaw v. Fisher*, 2 De G. & S. 11; *Wynne v. Price*, 3 De G. & S. 310. As to identity of person mentioned in share register book with person sued for calls, &c., see *Waterford, &c., Railway Company v. Wolsely*, 1 Ir. L. R. (N. S.) 444.

(i) *Ex parte Plant*, 4 Deac. & C. 160.

(k) *Hague v. Dandeson*, 2 Exch. 741; see 1 Mac. & G. 696.

banking copartnership, he himself being, also, a shareholder in his own right: he afterwards makes various sales, and purchases, in these shares of the company. There is no distinguishing mark by which the shares can be traced; they are in the nature of capital, expressed by quantity. The trustee then agreed with the copartnership, to assign to them some of the shares standing in his name, by way security, for advances made by the bank to him; but no transfer was actually made. The bank had no actual notice, that any of the shares were held on trust. The trustee afterwards becomes bankrupt: and it was held, that the bank had no lien on any of the shares which had been held in trust; and that, although the shares held, in trust, might have been changed, by selling and re-
[*496] purchasing, the *trustee must still be considered as holding, for the purposes of the trust, the same number of the repurchased shares, which stood in his name at the time of the bankruptcy.(l)

We may add a further remark, on the nature of shares. It is not proper to overlook the distinction which holds between the two classes of nonincorporated banking companies. They are either established, by deed, in accordance with 7 Geo. IV. c. 46, and the subsequent statutes, or they are directly established by private act of parliament. In the last case, the agreement, or contract of partnership, takes the form of law, under the authority of the legislature. Such statutes often contain a clause, providing *that the interests of the shareholders shall be deemed personal estate*. When that clause is embodied in an act of parliament, of course it is legally binding, whatever may be the effect; but, when that clause is contained in a deed of partnership, it may not have the same legal effect at all, because parties cannot agree among themselves to alter the legal character, or incidents, attaching to a certain description of property.

This is the distinction which obtains between the copartnerships, constituted by deed, and copartnerships constituted by act of parliament; and it appears to be the only distinction between them.(m)

In the instance of a banking copartnership, established in conformity with 7 Geo. IV. c. 46, it has been held, both at common law,(n) and in chancery, that shares in a bank, the property of which consisted, in part, of freehold and copyhold estates, and mortgages for terms of years, is
[*497] personalty, and not realty, and may be legally bequeathed to *charitable purposes, within the 9th Geo. II., commonly, but erroneously, called the Mortmain Act.(o)

In truth, a share represents the proportions of the profits to which each holder of it is entitled; it does not empower the holder to step upon the lands of the company, or use any portion of them, for his own private purposes; the holder, in this respect, is in no other condition than an ordinary partner.(p)

(l) Murray v. Pickett, 12 Cl. & F. 764; see 1 Russ. & M. 45.

(m) Myers v. Perigall, 2 De G., M. & G. 600, 601; per Ld. Truro, C.

(n) 11 C. B. 90; S. C., where see deed of settlement; and see Ashton v. Lord Langdale, 4 De G. & S. 402, 410, 411.

(o) 2 De G., M. & G. 620, 621, per Ld. St. Leonards, C.

(p) 2 De G., M. & G. 621; Sparling v. Parker, 9 Beav. 450.

Members, or Shareholders.—Let us next inquire, who are meant by members, or shareholders. Now, in the inquiry, whether any person is a subsisting member, it is often necessary to observe, whether the transfer from the shareholder, from whom he bought, has been made according to the requirements of the deed of settlement: thus, if it be a provision of the deed, that the consent of a board of directors shall be necessary to perfect a transfer of shares, it is indispensable to ascertain what this consent is, how it is to be signified, what is a board of directors, &c. However, though a transfer may be void, at law, for want of a proper consent of a duly constituted board of directors, it may be supported, in equity, where the circumstances are, that it has been made in the Share Registry Book, and three directors have given (as was usual) a certificate of the transfer; and a return has been made to the inland revenue officers, that the transferor had ceased to be a member, and, besides, the transferee has been treated as a shareholder by the directors; received dividends; had sent to him the circulars of general meetings, and notices of calls, and had attended meetings.

Also, where, in the circumstances above detailed, the bank suspended payment, and, upon a call being made, the transferee omitted to pay, by reason of inability, and the *bank made an entry in the share register list, stating the transfer to be invalid, for want of con- [*498] sent, &c., and made a fresh return, in which they inserted the transferor's name as a shareholder, and then instigated a creditor to commence an action, in which he obtained judgment, for their benefit, against their public officer, and the creditor brought a sci. fa. against the transferor, and recovered, on the invalidity of the transfer.(q) Nevertheless, it was held, in equity, that the transferor was no longer a shareholder, as between him and the company; and that the proceedings, being collusive, a perpetual injunction against levying execution on the judgment in the sci. fa. must issue.(r)

In this case, therefore, the transferee was the real member of the company.

With regard to persons who may be members of banking copartnerships; the trade, or business of banking, was held to be within 57 Geo. III. c. 99, which restrains spiritual persons from being occupied in any trade, or dealings, so that, if a bill of exchange were indorsed to a banking copartnership, and they sued as indorsees upon it, by their public officer, to show that spiritual persons were partners, and members of the company, defeated the action, and barred the company from recovering the amount of the bill, inasmuch as the copartnership was, in such case, carried on in violation of the above-mentioned statute.

The consequences were the same, in the case of any other bank, in which one of the members was a clergyman; even in the case where a clerical executor continued to carry on the business for the benefit of the testator's estate, as executor.(s)

The former of these results was thought to be so inexpedient, that an

(q) See 4 Exch. 699.

(r) Shortridge v. Bosanquet, 16 Beav. 84, 99; see 5 H. Lds. 297.

(s) Hall v. Franklin, 3 M. & W. 259, 268.

[*499] act of parliament was immediately passed, *to render contracts with these banking copartnerships valid, although they might have clergymen among the shareholders, or partners, by an act which was shortly afterwards repealed, and re-enacted with variations, by a statute,(t) which is given as follows: by which it will be observed, the law is left as above stated, with respect to members of ordinary banks, that is, other than copartnerships having more than six members; and also, that on these latter, clergymen cannot be directors, or managers, or take part in person in the business.

The words, *members for the time being*, mean such as were members at the time of the issuing of the *scire facias*; thus, the persons sued, have an opportunity of pleading, that they were not partners; and, if it were shown that they were on that issue, that would show that they were properly liable to the judgment, on which the *scire facias* issues.(u)

The words, *now a member*, are equivalent to a *member for the time being*.(x)

Scire Facias.—Having ascertained who are members for the time being in law, and obtained the names, &c., of those persons, and served them with notice of the motion, the plaintiff, who has obtained judgment against a public officer, and does not intend to issue execution against him, is to move the court for a rule for writs of *sci fa.* against a member, or members for the time being.(y) But, against such members, it at length seems to be settled, that the rule is absolute in the first instance, [*500] and need not be made in open *court,(z) and issuing the *sci. fa.* without leave, is only an irregularity, as has been said, and cannot be made the subject of a plea, not being a ground of defence.(a)

In all other cases within the purview of the act, there must be a motion for the *sci. fa.* made in open court, after notice to the person or persons sought to be charged.(b)

Then, what are the circumstances under which this motion will be granted:—

In order to obtain the leave of the court to issue a *scire facias* against a *former member*, applicant must make out, that is, the affidavit must state, according to the circumstances of the case:

(t) 4 Vict. c. 14; see *Ex parte Salkeld*, 3 M., D. & De G. 126. The deed of settlement mostly specifies classes of persons who shall not be members, *ex gra.*, infants, &c.

(u) *Dodgson v. Scott*, 2 Exch. 465; see 7 M. & W. 207, 208; 11 A. & E. 520.

(x) *Nunn v. Lomer*, 18 L. J., Exch. 342.

(y) *Dodgson v. Scott*, 2 Exch. 457; *Barker v. Buttress*, 7 Beav. 143. What affidavit sufficient, see 25 L. J., Exch. 249.

(z) *Harrison v. Tysan*, cor. Crompton, J., 1 Bail Court Cas. 111; *Johnson v. Brettell*, 7 Jur. 219; see *Esdale v. Trustwell*, 1 Exch. 371; *Bank of Scotland v. Fenwick*, 1 Exch. 795, where Rolfe, B., was of opinion that no leave of the court for a *sci. fa.* was necessary against members for the time being; see also *Ricketts v. Bowhay*, where Maule, J., 3 C. B. 900, and Cresswell J., id. 908, expressed the same opinion; *Cross v. Law*, 6 M. & W. 223; see *Wingfield v. Barton*, 2 Dowl. N. S. 355; and see 10 C. B. 169; 15 C. B. 459.

(a) *Bradley v. Warburg*, 11 M. & W. 452; *Marion v. Lund*, 16 Q. B. 345.

(b) Form of notice, see *Clowes v. Brettell*, 11 M. & W. 461. Probably the notice ought to be served personally; see *Esdale v. Smith*, 18 L. J., Exch. 120. Direction of court in granting *sci. fa.*, *Deveraux v. Kilkenny, &c., Railway Company*, 20 L. J., Exch. 39.

The judgment has been obtained against the public officer, and when, and for what sum; how much is due on the judgment:

The executions that have been issued on the judgment:

The means to levy under those executions:

Such other facts, as may tend to induce the court to consider due diligence to obtain satisfaction *from the members for the time being* has been used:

When the contract on which the judgment was obtained was entered into, or when the same was executed, as the case may require:

That the party proceeded against was a member at the time when the contract was entered into, *or* became a member *at any time before such contract was executed, *or* was a member at the date of [*501] obtaining judgment: (c)

The creditor of banking copartnerships ought to bear in mind, that though he is not bound to proceed at any particular time, on his judgment, yet, whenever he issues his execution, he ought to endeavour to make it available against all the then members of the copartnership, (d) as a general rule.

The scire facias will issue, although it be shown, by way of answer, to the application, that A. B., who is supposed to be in solvent circumstances, who has ceased to be a member, and is not named in the application, was collusively, and fraudulently, for the purpose of protecting him from liability, permitted to transfer his shares; nor, is it an answer, that C. D., not named in the application, but still a member, would, if execution went against *him*, be entitled to indemnity from solvent persons, though unable himself to pay the sum demanded; nor, is it answer, on behalf of E. F., included in the application, that judgment is entered up in respect of several causes of action, each distinct from the other, for one of which E. F. is not liable. (e)

Also, the scire facias may issue, even where execution has not gone against all the existing members, previously to the application.

Thus, if execution has been against several of the existing members, with no satisfaction obtained, and grounds are shown to convince the court of the insolvency of all the existing members, the applicant will not be obliged to issue *execution against the remaining existing [*502] members, but will be allowed to issue a sci. fa. against members, at the time the contract was made; (f) and, so he will be allowed to proceed by sci. fa., against the other classes, as stated above, who are made liable by the statute, upon his satisfying the court, in like manner, that the previous executions have been or would be ineffectual. (g)

All that is requisite is, that a sci. fa. should issue against an *existing*

(c) Bank of England v. Johnson, 3 Exch. 598; Dodgson v. Scott, 2 Exch. 469, will be found to be authorities for the several points above stated.

(d) Bank of England v. Johnson, 3 Exch. 598. What is enough to make out a *prima facie* case of diligence, Harvey v. Scott, 11 Q. B. 92; Field v. Mackenzie, 4 C. B. 705. As to fresh application for sci. fa., Field v. Mackenzie, 6 C. B. 384; on fresh materials, 2 Exch. 457; 13 Q. B. 344.

(e) Harvey v. Scott, 11 Q. B. 92.

(f) Field v. Mackenzie, 5 Dowl. & L. 172.

(g) Dodgson v. Scott, 2 Exch. 457.

member, or members, and that there should be a reasonable certainty that all remedies against the rest of the class would be ineffectual; then the application for a sci. fa. against another class may be entertained.

When a rule has been made absolute for a sci. fa. against former members, the court will refuse to set it aside, on the ground that the party obtaining the rule had omitted to disclose to the court, the fact of his holding the collateral security of a mortgage upon real property, made and assigned to the bank, which, it was believed, *by management and care*, might be made productive of an amount exceeding the mortgage debt; but no present means of obtaining satisfaction were shown; and, on the whole, the facts not being such, as if presented to the court on the former occasion, would have sufficed, to disentitle the applicant to the writ of sci. fa. *(h)*

So, in the case of any other collateral security; for instance, if the creditor held chattels of a third person, with a power of sale, it seems he would not be obliged to exercise that power, before resorting to the members of the second class. *(i)*

If the scire facias goes against a person who was a member, when part [*503] only of the contracts recovered upon were *entered into, the court would probably order, that there should be an express undertaking entered into by the plaintiff, not to levy against such person, for more than was actually due from him. *(k)*

If the sci. fa. has issued without leave of the court, in a case where leave is necessary, and if it is ambiguous on the face of it; in either case, there is nothing more than an irregularity to be taken advantage of on motion, which must be made promptly. *(l)* The fact is no defence in a plea. *(m)*

Where the application is for a sci. fa. against *retired* members, the court will not shorten the time for showing cause against the rule, on the ground that the three years limited by the statute, for proceeding against retired members, might expire before execution could issue. *(n)*

The scire facias ought, it seems, to state the judgment against the public officer, to have been for a debt due to the plaintiff from the company, *(o)* but there is no obligation to aver, that the company was actually carrying on business. *(p)*

The scire facias against one who was a member at the time of the contract, probably must state the previous execution had against the members at the time of the execution, for such previous execution is a condition precedent to the sci. fa. issuing against such member, and is the groundwork and warrant for it. *(q)* Against such a member the court will allow the writ to issue on prima facie evidence, that he was a

(h) Field v. Mackenzie, 4 C. B. 725. *(i)* Per Wilde, C. J., 4 C. B. 730.

(k) Harvey v. Scott, 11 Q. B. 92; see Firth v. Harris, 8 Dowl. 689.

(l) Ricketts v. Bowhay, 3 C. B. 889, i. e. before plea. Bradley v. Urquhart, 11 M. & W. 583.

(m) Bradley v. Warburg, 11 M. & W. 452; see 3 C. B. 897.

(n) Field v. McKenzie, 5 D. & L. 172. *(o)* Ness v. Fenwick, 2 Exch. 598.

(p) Ness v. Bertram, 4 Exch. 195.

(q) Bank of England v. Johnson, 18 L. J., Exch. 238; S. C., 3 Exch. 598.

member at the time of the contract,^(r) for if shown to have been once members, they will, in accordance with *the general rule, be presumed to continue so, in the absence of proof that they have [*504] retired.^(s)

The defence that they never were members, or that they had ceased to be so, before the contract was entered into, must be pleaded to the sci. fa.^(t)

Probably, it would be a good objection against allowing the sci. fa. against former members, to show that there was property of the bank that could have been taken under a sci. fa.,^(u) but not so to show that there was property that might be got at *otherwise*.^(x)

Any objection to the judgment on which the sci. fa. is to be grounded, will be out of place, as an answer to the motion for the sci. fa. If it is sought to impeach the judgment, on the ground of fraud, as, for instance, that it was a concocted proceeding to the prejudice of the proprietors of the banking company, the defendant must avail himself of the objection, either in the form of a plea to the sci. fa., or in the form of an application, specifically for the purpose of setting aside the proceedings as fraudulent;^(y) or an injunction to stay proceedings will be granted, as it seems, by the courts of chancery.^(z)

Nor does the objection, that the application has been made before, apply, it would seem, in cases of this kind; for the general rule, that a matter cannot be agitated twice, does not appear to apply to cases of motions for a sci. fa., in cases of banking copartnerships, provided the applicant makes his renewed motion upon fresh materials;^(a) [*505] and *where a rule to issue a sci. fa. had been obtained against a former member, which rule had been afterwards enlarged and subsequently abandoned, on payment of costs by the plaintiff, he was afterwards allowed to come to the court, for leave to issue such sci. fa., although there was no explanation offered, why the first rule was abandoned, nor any new facts alleged to have been discovered by the plaintiff, to justify him in making his second application.^(b) It will be observed, however, that on the former occasion, the effect of what took place merely was, that the plaintiff withdrew his application, and by that he was not bound, as he would have been, had the court made a decision finally disposing of the rule.

Also, more than one scire facias may issue at the same time, against different members severally, and it is not an objection that they are cou-

(r) Field v. Mackenzie, 4 C. B. 705.

(s) Harvey v. Scott, 11 Q. B. 92; see 14 M. & W. 11.

(t) Dodgson v. Scott, 2 Exch. 464; see 11 M. & W. 461; 18 L. J., Exch. 238. What pleas allowed, Phillipson v. Tempest, 8 Jur. 60.

(u) Per Maule, J., 4 C. B. 731; and see 15 C. B. 462, 463; 16 Q. B. 344.

(x) Per Maule and V. Williams, Js., 4 C. B. 731, 732.

(y) Dodgson v. Scott, 2 Exch. 458; see 6 Q. B. 587; 11 Q. B. 92; 15 Q. B. 548 11 M. & W. 432. Defendant cannot plead or set up matter that might have been available either way in the original action, Bradley v. Eyre, 11 M. & W. 432; see 6 Q. B. 587; 2 Exch. 458.

(z) Bargate v. Shortridge, 5 H. Lds. 297.

(a) Dodgson v. Scott, 2 Exch. 457.

(b) Dodgson v. Scott, 2 Exch. 457; see Field v. Mackenzie, 6 C. B. 384.

current,^(c) and unless it were shown, that a number of writs were resorted to, for purposes of oppression, and so that the process of the court was abused, the court will not interfere.^(c) But the rule for the sci. fa. must, in all cases, be served personally,^(d) except where the sci. fa. issues against those who are members for the time being.^(e)

Exemptions from Liability.—On inquiring what parties connected with the partnership are liable to its debts, it will be seen, a class of persons have apparently been overlooked by the legislature, and are therefore exempt, there being no words in the statute to comprehend them, viz., persons who have become members *after* the contract was completed, but have ceased to be so before judgment was obtained, though they [*506] were so at the commencement of the *suit*. This class is clearly exempt from liability, as members in seire facias.^(f)

Bankruptcy.—With respect to bankruptcy, it is to be observed, that a member of a banking copartnership cannot be proceeded against in bankruptcy, upon a debt due from the bank, where no judgment has been obtained against the public officer, although the business has been relinquished, and an order made to wind up the company, prior to the proceedings in bankruptcy; and the same is the case, although there be not any public officer in existence,^(g) and a *fiat* in bankruptcy in such case would be invalid, and either the petitioning creditor or the messenger, would be liable in trover, for the wrongful seizure under it.

A shareholder in a banking copartnership, after the bank, &c., had stopped payment, became bankrupt, afterwards an order for winding up the affairs of the banking company was made under the Winding-up Acts. Subsequently, the bankrupt obtained his certificate, and his name was afterwards included in the list of contributories. On a call being afterwards made upon the shareholders, the official manager of the company applied to prove for the balance due from the bankrupt, after debiting him in the company's book with the call, and it was held he had a right to do so, and that the proof must be admitted,^(h) for that a call made in respect of shares, which the bankrupt held before his bankruptcy, is to be treated for every purpose, as a separate debt of the bankrupt, in the administration of his estate. This conclusion was arrived at on the construction of the Winding-up Act of 1849.⁽ⁱ⁾

Besides, the modes by way of action against the copartnership, judgment thereon, and sci. fa. on such judgment, by **which* a [*507] creditor of the copartnership may realize his debt from the private funds of one or more of the shareholders, to which reference has been made already,^(k) it must be borne in mind, that the proceeding, by way

(c) *Nunn v. Lomer*, 3 Exch. 471; see *id.* 397; 2 *id.* 312; *Burmester v. Crofton*, 6 D. & L. 430; S. C., 3 Exch. 397.

(d) *Esdaile v. Smith*, 18 L. J., Exch. 120.

(e) *Per Maule, J.*, 3 C. B. 900; *per Cresswell, J.*, *id.* 908.

(f) *Dodgson v. Scott*, 2 Exch. 467; see 11 M. & W. 432.

(g) *Davison v. Farmer*, 6 Exch. 242, overruling *Ex parte Wood*, 1 M. D. & De G. 92; 2 *id.* 282.

(h) *Ex parte Nicholas*, 2 De G., M. & G. 271.

(i) 12 & 13 Vict. c. 108, ss. 14, 30; see 2 De G. M. & G. 276, 277.

(k) See *supra*, pp. 501, 502.

of trader debtor summons against a shareholder, may, in certain circumstances,^(l) be taken under the Bankrupt Law Consolidation Act of 1849. To enter upon this subject, however, would lead to much more detail, than is compatible with the compendious character of this work, as useful information could not be conveyed, except by placing before the reader a large mass of statutory enactments, and of decisions expounding them. It has, therefore, been thought best to refer to the works and reports, which treat exclusively of bankruptcy, where the proper modes of taking advantage of the bankrupt laws, in cases of copartnerships in banking, under 7 Geo. IV. c. 46, as well as of joint stock banking companies stopping payment, &c., will be found laid down and explained.^(m)

Insolvency.—On the insolvency of a banking copartnership, one Walker, a principal shareholder, gave bills and other securities, to another bank, to cover advances made by that bank, for the payment of the creditors of the copartnership; out of these advances the creditors were paid, and at the same time the debts were assigned by the creditors to one Richards, as trustee for Walker, by a deed reciting the above facts, and that Richards had agreed to pay the amount of the bills, &c. on having an assignment to him of the debts. One of the original creditors brings an action for Walker's benefit, against certain of the shareholders, to recover the amount of his debt: the defendants pleaded payment; but it was held that these facts did not support the plea; for payment extinguishes the debt, but *the parties here, by the [*508] assignment, expressly kept alive the debt.⁽ⁿ⁾

No more than one action, or suit, for the recovery of the same demand, can be brought against the copartnership, in case the merits shall have been tried in such action or suit.^(o)

Compromises.—Beyond the above modes of proceeding, it may be doubted whether there are any available for creditors or shareholders. Compromises, in the nature of composition with creditors, seem to be inapplicable to relieve shareholders from their liabilities.

A banking copartnership having stopped payment, certain of the shareholders (who afterwards acquired the management of the company's affairs,) contributed each, in proportion to the number of shares he held, to a common fund, to be applied to the protection of the contributors to it, in payment of the debts of the bank, and they called on all the other shareholders to contribute. This some of them refused to do, upon which an arrangement was made between the contributors and a creditor of the company, by which the creditor was to obtain a judgment against the company, to be used against such of the shareholders as *the contributors of the fund should select*. This was done, the company gave him judgment by confession, and the creditor issued a sci. fa. upon the judg-

(l) See 12 & 13 Vict. c. 106, ss. 77, 78.

(m) See Flather's Archb. Bank., 11th edit.; De G. Bank. Reports; De G., M. & G. Bank. Reports, &c.

(n) McIntyre v. Miller, 13 M. & W. 725; see Simpson v. Eggington, 24 L. J., Exch. 313.

(o) 7 Geo. IV. c. 46, s. 10, and 1 & 2 Vict. c. 96, s. 2; see Barker v. Buttress, 7 Beav. 141; Steward v. Greaves, 10 M. & W. 720.

ment, against a person who had been a shareholder, but before the date of the contract with the said creditor, on which judgment had been recovered, had assigned his shares to a trustee for the company, but the transfers were informal. The Courts of Equity regard this as a fraudulent transaction, and will restrain the creditor *from proceeding [*509] at law; (p) it is a contrivance to enforce indirectly against the said person the contribution, which they could not directly impose upon him. The House of Lords, in a case subsequently decided, has supported this view. (q)

Bank Notes, &c.—Provision is made for the issuing and re-issuing by these bodies of bank notes, upon security being given by sect. 16, but the enactment must be read in conjunction with the provisions of the Bank Charter Act, (r) given above. Section 16 provides thus:—

“That if any corporation or copartnership carrying on the trade or business of bankers under the authority of this act shall be desirous of issuing and re-issuing notes in the nature of bank notes, payable to the bearer on demand, without the same being stamped, as by law is required, it shall be lawful for them so to do on giving security by bond to his majesty, his heirs and successors, in which bond two of the directors, members or partners of such corporation or copartnership shall be the obligors, together with the cashier or cashiers, or accountant or accountants, employed by such corporation or copartnerships, as the said Commissioners of Stamps shall require; and such bonds shall be taken in such reasonable sums as the duties may amount unto during the period of one year, with condition to deliver to the said Commissioners of Stamps, within fourteen days after the fifth day of January, the fifth day of April, the fifth day of July, and the tenth day of October, in every year, whilst the present stamp duties shall remain in force, a just and true account, verified upon the oaths or affirmations of two directors, members or partners of such corporation or copartnership, and of the said cashier or cashiers, accountant or accountants, or such of them as the said Commissioners of Stamps shall require, such oaths or affirmations to be taken before any justice of the peace, and which oaths and affirmations any justice of the peace is hereby authorized and empowered to administer, of the amount or value of all their promissory notes in circulation on some given day in every week, for the space of one quarter of a year prior to the quarter day immediately preceding the delivery of such account, together with the average amount or value thereof, according to such account, and also to pay or cause to be paid into the hands of the Receivers-General of Stamp Duties in Great Britain, as a composition for the duties which would otherwise have [*510] been payable for such *promissory notes issued within the space of one year, the sum of seven shillings for every one hundred pounds, and also for the fractional part of one hundred pounds of the said average amount or value of such notes in circulation, according to the true intent and meaning of this act; and on due performance thereof,

(p) *Taylor v. Hughes*, 2 Jo. & Lat. 21.

(q) *Bargate v. Shortridge*, 5 H. Lds. 297.

(r) 7 & 8 Vict. c. 32.

such bond shall be void, and it shall be lawful for the said commissioners to fix the time or times of making such payment, and to specify the same in the condition to every such bond, and every such bond may be required to be renewed from time to time at the discretion of the said commissioners or the major part of them, and as often as the same shall be forfeited, or the party or parties to the same or any of them shall die, become bankrupt or insolvent, or reside in parts beyond the seas.”(r)

Any of these bodies beginning to issue bills or notes, or to borrow, &c., before making the returns, &c., above mentioned,(s) are to forfeit 500*l.* for each week that they neglect to make them, by section 18, thus:—

“That if any such corporation or copartnership exceeding the number of six persons in England, shall begin to issue any bills or notes, or to borrow, owe or take up any money on their bills or notes, without having caused such account or return as aforesaid to be made out and delivered in the manner and form directed by this act, or shall neglect or omit to cause such account or return to be renewed yearly and every year between the days or times hereinbefore appointed for that purpose, such corporation or copartnership so offending shall, for each and every week they shall so neglect to make such account and return, forfeit the sum of five hundred pounds; and if any secretary or other officer of such corporation or copartnership shall make out or sign such false account or return, or any account or return which shall not truly set forth all the several particulars by this act required to be contained or inserted in such account or return, the corporation or copartnership to which such secretary or other officer so offending shall belong shall for every such offence forfeit the sum of five hundred pounds, and the said secretary or other officer so offending shall also, for every such offence, forfeit the sum of one hundred pounds; and if any such secretary or other officer making out or signing any such account or return as aforesaid shall knowingly and wilfully make a false oath of or concerning any of the matters to be therein specified *and set forth, every such secretary or other officer so offending, and being thereof lawfully convicted, shall [*511] be subject and liable to such pains and penalties as by any law now in force persons convicted of wilful and corrupt perjury are subject and liable to.”

Accountable Receipt.—A banking copartnership, established under the stat. of Geo. IV., in acknowledgment of moneys deposited with them by a customer, gave two accountable receipts for 100*l.* each, signed by a clerk for the company; the course of dealing being, that the parties to whom the receipts had been given, returned them to the bank once a year, to be cancelled, when they were paid, or allowed the interest, for

(r) See as to issuing notes, 7 & 8 Vict. c. 32, s. 13, *supra*, p. 441; and same section as to amount of notes allowed to be in circulation.

(s) See *supra*, pp. 460, 463; see also *infra*, cap. xvi., for the penalties, &c., for neglect in this respect. N. B. Public officers indemnified in all cases by 7 Geo. IV. c. 46, s. 14; these bodies not required to take out more than four licenses, s. 17; see *supra*, p. 446. Penalties, &c., to be recovered in the Court of Exchequer, &c., s. 21. Forgery of bank notes of these bodies, 7 Geo. IV. c. 46, s. 9; see 1 Welsby & Beav. Statutes, 153; 2 *id.* Crim. Law, (227).

the past year, and took receipts in place of those which were delivered up. After the death of the customer, and pending a contest for the administration of his estate, the receipts came into the hands of a stranger, who fraudulently obtained payment for them from the bank, when the receipts were given up and cancelled, by tearing off the signature. The administrator recovered in equity the whole sum from the company, with interest and costs of suit.^(t) Nothing that had taken place had availed to absolve in equity the company from their original liability to pay the debt, of which the receipts were evidence.

Contracts with Company.—Where an act of parliament, establishing a railway, gas company, or other public body, enacts, that no person concerned, or interested, in any contract with the company, or public body, shall be capable of being chosen a director of the company or public body, and that if any director shall be directly or indirectly concerned in any contract, &c., he shall thereupon be immediately, &c., discharged from the direction: this does not affect directors who are members of a [*512] banking copartnership, *being the bankers and treasurers of the company, or public body.^(u) In such cases the contract meant, is a contract with the company, or public body, in the execution of its enterprise.

Buying out Shareholders.—In equity, and at law equally, it is said, that there is nothing in the act of parliament to prevent the company from buying out a member; and where a transfer of shares is made by a member to the company, the latter may, as between themselves and the shareholder, and other parties (if any) to the transfer, dispense with the machinery which is prescribed by the statute for transfers in general, and that the company, in such case, will not be allowed afterwards as between themselves and the partner, with whom they contracted, to impeach the transaction,^(x) there being nothing in the deed, expressly or constructively, forbidding it; and the practice having been for the company, or the directors on their behalf, to deal in this way with the shares, it having been done openly, never condemned by any general meeting, and in one case directly authorized by such a meeting; Sir E. Sugden, in deciding a case of this kind in Ireland, referred to it as “a rule always acted upon,” in common partnerships, that although articles, which had been agreed on to regulate partnership, could not be altered without the consent of *all* the partners, if alterations were made by some of the partners, and acquiesced in by all, that was an adoption of the new terms.^(y)

But though there is nothing to prevent the buying out of *a [*513] single member, in the act of parliament, it may frequently be inconsistent with the terms of the deed of settlement to do so; at all events to allow a dissentient body of shareholders to retire upon a pecuniary

(t) *Pearce v. Creswick*, 2 Hare, 286. So if the company had obtained the receipts, and then refused to pay, see 2 Hare, 289, n., 290, n., 297.

(u) *Sheffield, &c., Railway Company v. Woodcock*, 7 M. & W. 574.

(x) *Taylor v. Hughes*, 2 Jo. & L. 21. The same at law, *Cheltenham Railway Company v. Daniel*, 2 Railw. Cas. 728; and see per *Ld. St. Leonards, C.*, 22 L. J., *Chanc.* 203.

(y) Per *Sugden, C., Jr.*, 2 Jo. & L. 53; *Const v. Harris*, *Turn. & R.* 517; see *Ex parte Morgan*, 1 Mac. & G. 235; *Bargate v. Shortridge*, 5 H. Lds. 297.

consideration, &c., has been held (as we shall see) to be *ultra vires* of the directors, in certain circumstances; and all propositions of this nature ought to be looked at, with reference to the terms of the deed, in order to see whether they permit of the application of the company's funds to purposes of this nature.

The deed ought to contain strong and carefully-expressed clauses, forbidding such proceedings altogether.

General Meetings.—It has been repeatedly pointed out to be in general beyond the powers of a general meeting of shareholders, to alter the objects of the copartnership; to divert its funds to objects other than those contemplated in its deed of constitution; in short, it is beyond their competence to do anything that is to be valid and binding on the company, if it is not within the common contract which unites the partnership; but the same strictness does not appear to be applicable to matters not in themselves of an essential character; even where the deed by its terms seems expressly to exclude alteration; thus, where a deed ordained that the directors should never consist of more or fewer than sixteen, but also gave power to a special general meeting, "called for the purpose, from time to time, to amend, alter, or annul, either wholly or in part, all or any of the clauses of the said deed, or of the existing regulations and provisions of the company, and to make any new or other regulations, &c., such regulations, alterations, or annulment, if confirmed by a subsequent special general meeting, &c., to be binding and conclusive upon the proprietors:" and at a special general meeting the number of directors was reduced from sixteen to seven, and this resolution was duly confirmed by a subsequent special general meeting. This change, [514] it *was held, the powers of a special general meeting, by the constitution of the company, enabled them to effect.(z)

Resolutions, ex. gra., for altering the shares and capital of a company, may be illegal, and yet not have the effect of dissolving the company.(a)

Manager.—A manager may carry on a separate business, as a merchant or otherwise, by permission of the company; so doing, he is not entitled to give himself the same accommodation, in respect of his separate trade, which he might obtain from an independent bank. It would be necessary for him, in order to support such a proceeding, to show that he had brought the whole transaction, in all its parts, most fully before the directors; it would not be enough to show merely that he had not concealed any thing; such a proceeding, if the whole had been brought before the directors, and had been assented to by them, might be permitted to stand, but only in that case.(b)

The manager of a banking copartnership then has no right to give himself accommodation out of the funds of the bank, without the consent of the directors, given with a full knowledge of all the circumstances. This, however, though it will prevent the company from repudiating the

(z) *Smith v. Goldsworthy*, 4 Q. B. 430; see per Coleridge, J., 16 Q. B. 295, 296.

(a) 4 Q. B. 431.

(b) *Gwatkin v. Campbell*, 1 Jur. (N. S.) Chanc. 131; compare *Reg. v. Evans*, supra, p. 269.

transaction, will in many cases, as of course, fail to save them from loss.

Thus, where A. was a manager of a branch bank, and also executor of a testatrix, who had lent 1,500*l.* on the security of a certain ship. A. afterwards shifted the security from this ship to another ship, and further, in his character of executor, borrowed a sum of money, 1,600*l.*, from [*515] *the bank, and also lent it to the owner of the latter ship, and took a mortgage of that ship, for the 1,500*l.* lent by the testatrix, and also for 1,600*l.*, which he had lent as executor. Then, as security for the money lent to him by the bank, he, several months after the advance by the bank, assigned to them this mortgage, and the mortgage debts. The last-mentioned ship was sold for 1,150*l.*, and, in a suit by the residuary legatees of the testatrix against A. and the bank for the recovery of this sum, the executor, it was held, had no right to pledge the assets; but as the executor was also agent of the bank, the bank must be considered as having notice of his inability to pledge the assets, and could stand in no better position than he did, but the legatees were entitled, in preference to the bank, to the 1,150*l.*,^(c) and the bank having, in fact, already received this 1,150*l.*, were charged with interest on it at 4*l.* per cent., during the period, since they had received it, to the day of the final decree.

The manager of a banking copartnership, which stopped payment in January, 1846, indorsed a bill of exchange dated London, May 14, 1846, in this way—

“*Per proc.* Newcastle-upon-Tyne Joint Stock Banking Company,
H. Bleckley, Manager.”

The plaintiff proved that he was holder of the bill for value, having received it from the drawer, who had drawn the bill, it was suggested for his own accommodation, and had indorsed it to Bleckley, who had indorsed it as above, then redelivered it to the drawer. The action was against the public officer of the above named company. It was contended that the manager's authority to indorse, &c., was at an end on the stoppage of the bank, but the court dealt with the case as if the bank had not suspended payment. Other bills were produced, indorsed in the same way, one before, and the other after the bank stopped, upon which [*516] *actions had also been brought, and which had been paid by the bank.

The court considered the evidence to show that every bill that was accepted or indorsed by Bleckley, the manager, was accepted or indorsed in the above manner by *procurator*; the legal effect of which is, an express intimation to every one, that the acceptance or indorsement was done under a special or limited authority, binding every one, therefore, to ascertain before they took the bill, that the indorsement was agreeable to the authority given, according to a well-known rule respecting all such acceptances or indorsements. A party taking such a bill, therefore, without inquiry, if it turns out that the party indorsing exceeded his authority, he must suffer for his temerity; and the jury found that the manager

^(c) *Collinson v. Lister*, 25 L. J., Chanc. 38; S. C., 20 Beav. 356. As to manager suing for percentage or commission against the company, *Law v. Thompson*, 15 M. & W. 541.

had not authority to indorse in this case; the bank had a verdict, which was upheld by the court.(d)

A promissory note, to secure an account at the branch bank at Birmingham, of the banking copartnership, called the National Provincial Bank of England, was given in this form:—

“£1,000.

“*Birmingham, March 24, 1836.*

“Three months after date we promise to pay to the manager of the National Provincial Bank of England the sum of one thousand pounds.

“A. B.

“C. D.

“E. F.”

At this time the National Provincial Bank of England carried on business, as well in other places as in Birmingham, by means of branch banks, but having a general board of management at London, under a board of directors, at which Robertson was manager. Elrich was the local manager at Birmingham.

*In an action against A. B. and C. D. on this note by Robertson, who declared, as manager of the National Provincial Bank [*517] of England, not styling himself public officer, it was objected, that the action should be brought by the bank, suing by their public officer; but it was ruled by the learned judge, that the facts stated were distinct evidence to go to the jury, that the plaintiff was the manager intended in the note, and that it was not open to the defendants to contend that the bank ought to have sued by its public officer, and the judgment was against the defendant.(e)

An instrument, in the form of a bill of exchange, drawn by the manager of a branch bank, by order of the directors, on the head office, but expressed in the body of it thus, “pay without acceptance,” may be declared upon, as a promissory note, and any of the directors may be sued as maker by the indorsee.(f)

On an indictment for forging a bill of exchange, the instrument, as set out, was in this form:—

“*Flintshire District Banking Company,*

“*Flint, 29th Sept., 1837.*

“Twenty-one days after date, pay (without acceptance) to the order of Mr. James Henderson, £70.

“For value received for the company,

“J WATKINS, *Manager.*

“To the London and Westminster Bank.”

And it was considered, at *Nisi Prius*, to be properly described as a bill of exchange.(g)

The public officer is not necessarily manager of the affairs of the copartnership;(h) one person, however, may discharge both duties; whether

(d) *Alexander v. Maekenzie*, 6 C. B. 766; per proc. usually implies authorization by power of attorney.

(e) *Robertson v. Sheward*, 1 M. & Gra. 511.

(f) *Miller v. Thomson*, 3 M. & Gra. 576.

(g) *Reg. v. Kinnear*, 2 Moo. & R. 117.

(h) 6 C. B. 766; see 1 M. & Gra. 511.

in any given case that is so or not, must depend in general, upon the terms of the deed of settlement, which also is the source to ascertain [*518] whether *any act is within the authority or not, of the manager, or public officer. What is the authority and the extent of it, is a question of fact, and the answer is to be sought for in the deed of settlement, in the first instance; if that is silent on the subject, then evidence of what acts are usually performed by managers, or what acts the manager of the particular company has been used to perform, as the case may be, must be resorted to.

It will probably be most convenient to define in the deed of settlement, as carefully and fully as possible, what are the duties and powers with which the shareholders entrust the manager, especially as regards external acts, such as the extent to which, and the form in which, the manager shall be empowered to bind the company by accepting or indorsing bills, taking up loans, &c.

Generally, with respect to the character and liabilities of the situation or office of manager of a banking copartnership, it is obvious that the situation of manager is one of high trust, but the trust becomes still greater, and the responsibility much enhanced, in case of a *local* manager of a branch establishment of the bank. For many purposes he is looked upon by the law, and is treated as if he were the whole body, whom he has power to bind even by his tortious act, although he may not be a partner.

For instance, if a local manager of a branch bank gets into his hands the money of a customer of the bank, by inducing the customer to consider that he is acting in the transaction as agent of the bank, and is invested with authority to effect the purposes for which the customer confides the money to him, and then appropriates the money to his own purposes, the customer's loss will fall upon the copartnership. To hold the bank not to be liable in such case, would be, it has been said, to hand over the public to the mercy of the clerks employed by these banks. The principle seems to be, that the manager is a servant, whom the [*519] bank, for the purposes of their trade, virtually accredit and hold out to the world as invested by them with general authority to act for them in the affairs of the branch bank; and the public have no power or means to discriminate what is, and what is not, in any particular case, within the legitimate scope of the agent's powers, or in accordance with the directions of his masters; and, therefore, when a customer, in a matter belonging to his relations with the branch bank, confides in the servant, he, in fact, trusts the masters, and they are liable accordingly for the fraud of the servant whom they have chosen.(i)

That the manager of a branch bank must necessarily have a larger authority than usually attaches to agents, is apparent from this: an agent, in general, has no authority implied by law, and, independently of his particular instructions, to borrow money for the service of his principals in the business he conducts for them; to obtain deposits, that

(i) *Thompson v. Bell*, 10 Exch. 11; see *Pickering v. Busk*, 15 East, 53. The manager is not the agent of the shareholders to commit a fraud, see *Bernard's* case, 5 De G. & S. 289; and see 3 De G. & S. 90.

is, to obtain loans of money for his employers, is one principal part of the business of a manager of a branch bank; his power, in this respect is unlimited; and thus he makes them responsible for every shilling which he receives from a customer of the bank.

So, if he advances money on loan, the loss, if any, must fall on the shareholders of the bank: thus, in a case where the manager of a branch bank had advanced money to the agent of a mining concern, to pay the wages of the labourers in the mine, which were in arrear, and for which they had obtained warrants of distress upon the materials, &c., in the mine, the copartnership of the bank were unable to recover the amount of the advances, by action, against a shareholder in the mine, on the ground that an agent, in general, has no implied authority to borrow money for the service of his employers, and there was no evidence of any special authority having been given by the shareholders, although the money *had been duly applied, in payment of the wages due [*520] from the shareholders to the labourers. (k)

In respect of any contract, into which the manager might enter, on behalf of the branch bank, provided it fell within the usual course of banking business, although, under the deed of settlement, or otherwise, the manager might be restricted from entering into contracts of that particular class, there being no proof that the party, with whom the contract was entered into, was cognizant of the restriction, the copartnership would be liable. (l) Then, as to the course of banking business, there is no doubt, that the nature of the business of bankers is part of the law merchant, and is to be judicially noticed by the courts. (m)

Branch Banks.—A branch bank is considered, for some purposes, as a distinct establishment, from every other branch of the concern. Thus, where a bill of exchange was indorsed to a Branch Bank of the “National Provincial Bank of England,” established at A., who sent it to another branch, established at B., who indorsed it to the head establishment, in London, it was held, in an action upon the bill, by the indorsee against the drawer, that each of the branch banks were to be considered as independent indorsees, and each entitled to the usual notice of dishonour. (n)

Bankruptcy.—In addition to what has been stated above, on the subject of bankruptcy, it seems proper to add some observations here.

That bankers, as such, are liable to the bankrupt laws, has already been stated; it has also been pointed out, that a *person, attempting to make himself liable to those laws by the purchase of shares [*521] in a banking copartnership, will not be allowed to obtain the advantages that he proposed to himself; on the other hand, a man cannot escape from the effect of the bankrupt laws, as to the whole of his property, by showing that his only trading property is comprised in shares in a bank-

(k) *Hawtayne v. Bourne*, 7 M. & W. 595.

(l) *Hawken v. Bourne*, 8 M. & W. 709; see *Ex parte Chippendale*, 4 De G., M. & G. 19.

(m) *Per* Ld. Campbell, 6 Moo. P. C. 173, referring to *Brandão v. Barnett*, 12 Cl. & F. 787.

(n) *Clode v. Bayley*, 12 M. & W. 51; and see further *supra*, pp. 415, 416.

ing copartnership. An act of bankruptcy may be committed by a person, whose sole trading property consists of two shares in a bank, (worth less than 20*l.* each,) conveying all his other property to a creditor, to secure a debt, although the two shares were not conveyed, and although the conveyance did not operate to stop the trading as a banker.(*o*)

It seems material to notice this decision, because various cases are to be found,(*p*) from which the law would appear to have been laid down, without qualification, that, in order to render an assignment of a trader's effects an act of bankruptcy, it must be shown, that the party assigned all, or so nearly all, of his effects, as to put it out of his power to carry on the trade, and, *ex converso*, deeds of assignment have been held not to be acts of bankruptcy, because they did not convey all the trader's property.(*q*)

But the deed, in the above case, was held to be an act of bankruptcy, because its necessary consequence was to delay creditors,—the person in question had many private creditors,—and, as every one must be taken to intend the necessary consequences of his own acts, the deed of assignment was considered to have been made with that intent, and, therefore, to be an act of bankruptcy under the 67th section of the Bankrupt Act, which makes acts done with intent to delay creditors—not saying *trade* [*522] creditors—acts of bankruptcy. *The smallness of the property, in respect of which the party is a trader, makes no difference, for there cannot be one rule of law, when a man is a trader to a trifling amount, and another where his trade dealings are large.

Six persons are copartners in a bank; two of them carry on a separate business as ironmongers; on a commission of bankruptcy issuing against the partners in the banking house, it appeared that a sum of 8,222*l.* was due from the bank to the ironmongers' firm, in respect of moneys procured for the benefit of the bank, on the credit of the indorsement, by the ironmongers' firm, of bills drawn by the banking firm, which, upon the credit of such indorsement, had been discounted by the Bank of England.

Now, the rule is, that a partner in a firm, against which a commission of bankruptcy issues, shall not prove in competition with the creditors of the firm, who are, in fact, his own creditors, shall not take part of the fund, to the prejudice of those who are not only creditors of the partnership, but of himself.(*r*)

To that rule there is an exception, manifestly founded in justice, and that is, where a partner becomes a creditor, in respect of the fraudulent conversion of his separate estate, to the use of the partnership.(*r*)

Another relaxation of the rule has been admitted, that where there is a demand, arising from a dealing by the partnership in a distinct trade,

(*o*) *Smith v. Cannan*, 22 L. J., Q. B. 290; S. C., 2 E. & B. 35; see 12 & 13 Vict. c. 106, s. 67.

(*p*) See 22 L. J., Q. B. 291.

(*q*) 8 Exch. 221; S. C., 22 L. J., Exch. 27; *Leake v. Young*, 25 L. J., Q. B. 266; *Ex parte Taylor*, 5 De G., M. & G. 392; see 17 Jur. 476.

(*r*) *Ex parte Sillitoe*, 1 Gly. & J. 382, cor. *Ld. Eldon*, C.

proof might be admitted.(s) But, in the above case, there having been no dealing by the ironmongers with the bankers, in the way of the trade of the former, no iron goods furnished, but the only dealing being, in fact, advances of money by them to retire the bills of the bank with, Lord Eldon held, that the proof, in respect of the above debt, was inadmissible.(s)

*But when the advances are made by the banking firm, in the way of its trade of banking, and in the course of legitimate dealings, then the debt may be proved. [*523]

Thus, A., B., C., D., and E., constitute a firm of bankers, at York; A., B., C., and D., constitute another firm of bankers, at Wakefield; and the latter firm becomes indebted to the former, in the way of trade dealings, in a sum of money; on the bankruptcy of the former, that sum may be proved as a debt on behalf of the creditors of the York Bank, as against the estate and effects of the Wakefield Bank, the two firms and trades being distinct.(t)

It would have been the same, if a banking firm, consisting of several, had claimed to prove against any other trading firm, constituted by two, or more, of their own partners in respect of advances made by them, the bankers, in the way of their trade, to the lesser firm.(u)

But, it seems, this would not be so, if the other firm consisted only of one person, a partner in the banking firm, because the creditors of the joint firm are his creditors, and he would, if his debt were allowed to be proved against the banking firm, be taking from his own creditors what ought first to be applied in payment of their debts; but, where two, or more partners carry on the other business, the creditors of the larger firm are not the creditors of the smaller firm, and the reason does not apply.(x)

Bankruptcy and Winding up.—With respect of bankruptcy, &c., of the company, it is expressly declared and enacted,(y) that every company, of more than six persons, *carrying on the trade, or business, of bankers, in England, shall be deemed a trading company, within 7 & 8 Vict. c. 111, intituled, “An Act for facilitating the Winding up of the Affairs of Joint Stock Companies, unable to meet their Pecuniary Engagements;” and the new Joint Stock Companies Regulation Act, which contains new provisions for winding up, does not apply to banks; 19 & 20 Vict. c. 47, s. 2.

The statute, first referred to, provides, among other things, that companies may be made bankrupt, the bankruptcy of the company not being construed to be the bankruptcy of any member, in his individual capacity; it declares what acts of the company shall be acts of bankruptcy; enables the assignees of the estate of a company to maintain

(s) Id. 383, 384. Except in the case of bankers, one firm is not allowed to prove against another firm, carrying on a distinct trade, but consisting in whole or in part of the same persons, where the debt arises only from money advanced by one to the other. Colly. Partnersh. 676, 2nd edit.

(t) Ex parte Castell, 2 Gly. & J. 124.

(u) Ex parte Brenchley, 2 Gly. & J. 127; S. C., 5 L. J., Chanc. 73; Ex parte Stroud, id.

(x) See per Leach, V. C., 2 Gly. & J. 126, 127.

(y) 7 & 8 Vict. c. 113, s. 48; see infra, cap. xvi.

actions to recover debts, or demands, on behalf of the company, and enables any persons, including members, to prove or claim under the *fiat* against the company; provides, that a member's shares shall not be set off against demands by the assignees, with other provisions, assimilating the condition of a bankrupt company to that of an individual.

Therefore, a *fiat* in bankruptcy may be had recourse to against all banking copartnerships, established under 7 Geo. IV. c. 46, for none can be established under that act that do not exceed six persons in the number of the partners.

With respect to winding up the affairs of a banking copartnership, of this nature, under the Winding-up Acts,^(z) the case is the same, in effect; for these apply to partnerships, associations, and companies, whereof the partners, or associates, are not less than *seven*.^(a)

Therefore, all banking copartnerships, established under 7 Geo. IV. c. 46, are, also, liable to be wound up under those statutes.

[*525] But *these* copartnerships, under 7 Geo. IV. c. 46, are *expressly exempted from the operation of the act of 1844, for the Registration, &c., of Joint Stock Companies.^(b)

Notice.—The operation of the acts of parliament, relating to copartnerships, established under 7 Geo. IV. c. 46, is such as to render them *quasi* corporations to this extent, that notice to one of the members, or even to one of the directors, provided he has, by the constitution of the company, no share, or control, in the management of the accounts of the company, is not notice to the company.^(c)

Directors.—In inquiring as to the authority, powers, and liabilities of *directors* of a banking copartnership, in the first place, it will be proper to premise, that, in construing a deed of settlement of one of these copartnerships, the court will, while collecting the extent of the authority intended to be conferred, on the directors, construe it with reference to the nature of the business, which was to be transacted, and the purposes which it contemplated, in order to judge what powers and authorities the law would imply from the nature of the office, and how far those powers and authorities are enlarged, or restricted, by any of the provisions of the instrument.^(d)

In a case, wherein the deed of settlement expressly invested the directors with full power and authority to superintend, order, conduct, regulate, and manage all and singular the affairs and business of the said company, to the best of their discretion and judgment, and provided that the board of directors should, and lawfully might, from time to time, [*526] devise and make such provisions, rules, orders, and *regulations, touching the government, carrying on, and management of the affairs of the said company, the same not being repugnant to the general rules and regulations, in the deed contained, as they should think expe-

(z) 11 & 12 Vict. c. 45, amended by 12 & 13 Vict. c. 108.

(a) 12 & 13 Vict. c. 108, s. 1.

(b) 7 & 8 Vict. c. 110, s. 2.

(c) Powles v. Page, 3 C. B. 25; see Willis v. Bank of England, 4 A. & E. 21.

(d) Bank of Australasia v. Breillat, 6 Moo. P. C. 190. Further, as to powers of directors and construction of deed of settlement, see Forbes v. Marshall, 11 Exch. 166. Pass book when not evidence of person being director, 16 C. B. 671.

dient; and the deed also provided, that the concern should continue for 100 years: it was held, that the directors had the powers of managing partners, in an ordinary banking partnership, amongst which, is the power of borrowing money, for the purpose of discharging the existing liabilities of the bank, till the assets can be realized; and of discontinuing the bank, if they think such a step essential to the interests of the shareholders; and that their having raised a loan, which they had undertaken to repay, and accompanied the engagement with other stipulations, some of which were *ultra vires*, did not discharge the bank; the only effect being, that such stipulations could not be enforced.(e)

But it seems hardly necessary to point out, that directors of a banking copartnership, whether with or without the consent of the majority of the shareholders, have no authority to convert their banking company into a company for different purposes; and that money borrowed for the purpose of effecting that transmutation, with notice on the part of the lender, will not form a debt of the company, for the recovery of which it can be sued.(f)

Nevertheless, directors may, undoubtedly, at their discretion, either *discontinue* altogether the business of the concern, or restrict the business to certain portions of that which it was originally intended the bank should employ its funds, &c., in, if the directors think such steps essential to the interests of the shareholders. Such a power seems necessarily implied in the exclusive power of management; in the power of determining what transactions should be entered into, *what notes [*527] issued, what deposits received, what bills discounted, or loans made.

The other hypothesis involves this difficulty, that, if the business can only be discontinued by a vote of the majority of the shareholders, then, unless a majority can be brought together, in person, or by their attorneys, the business, in the above instance, must have continued for 100 years,—it being a stipulation of the deed of settlement, and, indeed, the principal object of it, that such should be the duration of the banking establishment,—and never, during that period, could have been concluded, except by bankruptcy or insolvency.

But it, by no means, is incumbent on creditors, in such a case, to have recourse to a *fiat* in bankruptcy; they have a right to recover their debts from each individual shareholder, so that, in the above case, the bank must go on until each individual shareholder was ruined.

This, therefore, is an inadmissible supposition.(g)

But, though the directors may restrict, it does not seem that, even with the sanction of a majority of the members, they have the same power to extend, the business; *ex. gra.*, if the copartnership were constituted to do banking in England, they could not extend the business to India or the colonies:(h)

(e) Bank of Australasia v. Breillat, 6 Moo. P. C. 152, 193.

(f) 6 Moo. P. C. 197. There are strong authorities that "to a bill praying a dissolution of a partnership, all the partners must be parties." Per *Ld. Cottenham*, C., *Walworth v. Holt*, 4 My. & C. 635.

(g) 6 Moo. P. C. 198.

(h) See 10 Hare, 54, 55, 61; 1 Colly. 379.

The following case, in some degree, illustrates the question of what is business within the scope of these copartnerships.

The deed of settlement of a banking copartnership provided that the directors should not be fewer than five, nor more than seven; that three, or more, should constitute a board, and be competent to transact all *ordinary business*; that the directors should have power to compound for any debt owing to the company, and accede to and execute any deed of [*528] composition, or conveyance, or assignment of his *estate or effects, made by any debtor of the company, whether a shareholder or not, for the benefit of his creditors, and to give time to any debtor for the payment of his debt, either upon security, or without; and to abandon any debt which might seem bad or desperate.

A. had bought, of the bank, a colliery, of which they were mortgagees, for a sum, part of which he had paid in cash, and for the balance had accepted bills which had been renewed, and of which some were in circulation, and others overdue, in the hands of persons with whom they had been negotiated by the company. He was also largely indebted to the company on the balance of his account current. Afterwards the number of directors having become reduced to four, these four executed a deed, compounding the debt on the account current, and for the remainder of the purchase-money, on payment of 1,000*l.* by A., and his agreeing to abandon the colliery to the bank; the directors also covenanted "on behalf of the company, so far as they could lawfully bind the said company, but not further, or otherwise," to indemnify A. against all such bills of exchange as had passed through the company's hands.

A. brought an action of covenant for not indemnifying him, when it was held that the covenant did not bind the copartnership; for that this was not *ordinary business*; and no smaller number than five directors were competent to transact it; and it was made a question whether a board of three directors could transact even ordinary business, unless it was a board of three out of five directors.(i)

Appropriation of Shares.—Directors ought to be aware of the following principle.

A transaction entered into by them, as, for instance, the appropriation to themselves of shares, may be incapable of being sustained, with regard to the provisions of the deed of settlement, or the principles of equity governing the [*529] *administration of trusts, as a transaction binding on the company, unless brought before the shareholders, and confirmed by them; yet, nevertheless, the directors, by that transaction, although not confirmed, &c., may be bound, as between themselves and the company, notwithstanding the irregular nature of it.

Thus, A., a director in a banking copartnership, had regularly, before 1840, become owner of twenty shares, which number of shares each director was, by the deed of settlement, obliged to hold, as a qualification for the office. The deed of settlement provided, that the shares of the company should be vested in the court of directors, who should have full power to allot, *appropriate*, reserve for, or dispose of the same, to such

(i) *Kirk v. Bell*, 16 Q. B. 290.

parties, and upon such terms, and in such manner, as they might think fit: it was also provided, that the executor of any proprietor should not, as such, be a proprietor in respect of such shares, but he should be at liberty to dispose of them; or the company might, upon an executor giving notice, and complying with the provisions of the deed, permit him to become the proprietor, and personally chargeable.

The directors, 7th August, 1840, resolved, without the privity of the shareholders, to appropriate to themselves a certain amount of additional shares—or, as they called them, “credit shares”—which they were severally to pay for, by giving, respectively, their promissory notes, payable to the trustees of the bank, for the amount for which each subscribed.

A. agreed to take (and he gave a promissory note in payment for) one hundred of these shares; he also signed a letter, binding himself to pay the deposit and calls on them, but did not execute the deed of settlement in respect of them. He died in 1848, eight years after the making of the promissory note, never having paid any interest on, or any part of the principal of, the promissory note; in the books of the company, however, credit was given to him in *respect of dividends on the [“credit shares,”] and he was charged with interest on the promissory note. [*530]

His executor was held to be rightly placed on the list of contributories, not only in respect of the twenty shares, but also in respect of the one hundred “credit shares,” although the creation of the “credit shares” was not warranted by the deed, nor were they, in fact, ever issued or allotted.

The directors, it was said, “clearly were not entitled to allot to themselves a very large proportion of the capital of the company without bringing in a single shilling in aid of that capital, only giving promissory notes, payable at some distant period, debiting themselves with interest, as it became payable on their several notes, and taking credit for the dividends, to which they would properly have been entitled, if they had actually made the payments.”(k)

The whole transaction, it is to be observed, remained on paper only, while it was represented as a real transaction; for the directors publicly stated their liability to pay up a capital, equal to 10*l.* a share, upon as many “credit shares” as they had respectively appropriated to themselves. Such a transaction could obviously never be maintained in a court of justice, for the effect of it would be, that the directors would be at liberty, if the speculation flourished, to insist upon it as a real transaction; if it failed, to throw up the shares, on the plea that they had entered into dealings which were not authorized or sanctioned by their deed of settlement.

Hence they were held to be themselves bound by the transaction, although they were not entitled to enforce it against the general body of the shareholders, and, consequently, the executor was liable as a contributory.

(k) In re Royal Bank of Australia, (Robinson's Executors' case,) 2 De G., M. & G. 517, 520.

In a case which arose under the same deed of settlement, a director was regularly owner of twenty shares; he, subsequently, in pursuance of the resolution of the court of *directors, mentioned in the last [*531] case, took five hundred of the "credit shares," and gave his promissory note, payable in five years, for the amount; he also signed a letter binding himself to pay the deposit and the calls, but did not execute the deed of settlement in respect of the five hundred shares. Three months after this he died. Within one month from the death, his executors applied to the directors to ascertain the extent of his interest in, or liability to, the company. In answer, they were informed, on behalf of the directors, that their testator held twenty shares. These were, thereupon, duly transferred to a purchaser, and the directors afterwards cancelled the five hundred shares, and the promissory note for the amount.

Eight years after the death of the testator, it was held that the executors ought not to be placed upon the list of contributories, under the Winding-up Act, 1848, for, although his estate might have been bound, if the claim had been promptly asserted, at the instance of the shareholders, yet, that so long after the distribution of his assets, the loss arising from the misrepresentation of the directors must fall upon themselves and the company, and not upon the estate.^(l)

Notwithstanding what has been said with respect to the conduct of the directors of the same company in the former case, it will not be superfluous to add some observations, with a view to place the law of these cases in a clearer light.

The deed of settlement provided and required that the capital of the company should be one million sterling, divided into 20,000 shares of 50*l.* each, and that the proprietor of each share should bring in and pay to the company the full sum of 50*l.* in respect of such share, as and when called upon so to do, in manner thereafter (i. e. in the deed of settlement) provided. The court, therefore, gathered the intention of [*532] the parties to the deed to be "that *all the shares should be actually bonâ fide subscribed for as upon money payments, no doubt depending upon the periods when the directors should think it right to make the call."^(m)

Another clause, (already set out in the last case,⁽ⁿ⁾) the court thought might be considered, perhaps, as giving power to the directors "to appropriate or reserve," not in terms, but in substance, *for themselves and their friends*, the whole of the shares; the words are, "to such parties, and upon such terms as they shall think fit," which rather looks as if they were to deal with third parties; but, whoever might take them, the shares could only be taken, subject to a general liability to pay for them, as a money transaction, although the payment was to be deferred, in the shape of calls, till wanted.^(m)

The whole amount of the "credit shares" taken by the directors formed an enormous sum, in the aggregate, and a very large proportion of the

(l) Meux's case, 2 De G., M. & G. 522, cor. Ld. St. Leonards, C.

(m) 2 De G., M. & G. 529.

(n) See *supra*, p. 529.

entire capital mentioned in the deed of settlement. The way in which this measure was carried into execution was not by allotting any of these "credit shares," for there was no trace of any allotment in the books of the company, much less was there any evidence of the transfer of any such shares. It was not, in point of fact, a real transaction, as regarded as a purchase of shares. What the directors meant to do was to enter into an engagement between themselves, that as money would be required to sustain the concern, they would, in the proportions in which they had subscribed, make the advances upon what were called "credit shares," but which were, in fact, *credit sales*. These shares were entered in the books as 10% shares; there was, however, no creation of any such shares; but supposing them to have been actually existing, there was no evidence before the court to show *that any one of these directors was entitled to any specific credit shares, because none were ever issued, [*533] and marked as required by the deed. Then, were these "credit shares" ever treated by the directors themselves as real shares? Up to the death of the testator in this case, dividends were paid on the shares which had been regularly¹ allotted, but no dividend was ever paid upon these "credit shares;" none was claimed; no calls were made; no payment of interest was ever made on the sums for which the directors had given their promissory notes. The testator was, at the time of his death, a real holder, as director, of twenty shares, and those were regularly entered in a separate account to his credit. The payments on those shares were regularly given credit for; he had received dividends upon them; and when the executors sold them there was a regular transfer of them, in precisely the same way as any other shares would have been dealt with, and transferred, by any individual shareholder. That showed a dealing regularly with the shares which were created, but with respect to the cancellation of the "credit shares," which were neither created nor allotted, that was not a regular transaction, and it never was communicated to the shareholders generally.

There was this difference between this case and the one above discussed, that in consequence of the testator's death, in January, 1842, he did not appear to have been credited in the books of the company with any dividends in respect of the "credit shares;" and it was remarked, as an extraordinary circumstance, by Lord St. Leonards, that, although the testator, Mr. Meux, was a man of business, and had taken, and made himself responsible for, five hundred "credit shares," yet there did not appear to have been any entry, or trace of any item respecting these shares, in any of his private books, which would have led any one, more especially those with whom he was connected, to suppose that he had entered into any such transaction.

The executors, from the replies that were made to their *inquiries by the secretary, on behalf of the directors, when, in consequence, they had sold and transferred the twenty shares, believed, and had a right to believe, that they had no longer any liability or interest in the concern.^(p) Seven years after all this had taken place, the [*534]

(p) Per Ld. St. Leonards, C., 2 De G., M. & G. 533.

attempt was made to place them on the list of contributories, on the assumption that the testator's estate remained liable for the amount of the five hundred "credit shares."

Now, with respect to the answer of the directors, before mentioned, that the testator was holder of twenty shares, it was contended that the directors were not agents of the company, or, as such, clothed with authority, to make any *misrepresentation*, and that, therefore, any statement by them, which was contrary either to fact or law, would not be a statement obligatory on the general body or the shareholders.

That, however, the court held, not to be the nature of this case. Here all the directors had, without the knowledge of their shareholders, entered into an irregular transaction. As far as appeared there had, at no time before the first application of the executors, been any representation made, by the directors, to the shareholders at large, that there had been any paid-up capital realized, or realizable, from the shares so improperly taken by the directors.

It remained, at that time, a transaction simply resting upon the promissory notes, and upon the agreement between the directors; it never was a concluded transaction; no shares were ever issued and marked; so that there never were any of these shares which could be considered as the particular shares that belonged to a particular director. Then the directors, who entered into this incomplete transaction, cancel it, so far as relates to the estate or interest of Mr. Meux. Never having been communicated to the shareholders, it was an improper transaction, but up to the time of the cancellation no benefit had been derived from it, and no damage had been sustained by reason of it.

[*535] *Under these circumstances the court could not conclude that the directors had *not* the power to rescind what had never been a concluded transaction, nor been represented, to the shareholders at large, as a transaction binding upon Mr. Meux.(*q*)

Had this claim been made, on behalf of the shareholders, upon his estate, immediately after the occurrence of the transaction, the court might have held that the executors could not be released; but, being made upwards of seven years after they had been released, and the assets distributed, it was impossible to enter into an inquiry of what had become of those assets, and to trace them through the different persons who might have enjoyed the benefit of the release of the executors.

Such an inquiry might, the court observed, bring ruin on many persons; to say nothing of the endless litigation which would inevitably arise, in order to give to the general body of the shareholders of this company, a benefit to which, in the opinion of the court, they were not entitled.

"This is a case, (Lord St. Leonards went on to say,) no doubt, which tries the doctrine of law and equity very strongly, because Mr. Meux himself was an original wrong-doer, and this release of the executors, (which the representations of the directors to them operated to effect,) is to be obtained for the benefit of his assets. But it cannot be endured,

that any body of shareholders shall be at liberty to say, that their directors are to make a representation, upon the faith of which parties are to act, and distribute assets, and that the general body are not to be bound by those representations. It would require, (it was said,) a very strong case, to induce the court *to release the general body from the effect of representations of directors, though improperly made*, but which led to the distribution of assets. In answer to those seeking to recal the assets so distributed, the court would be *more disposed to hold, that the directors, *who had made the misrepresentations, should be personally* [*536] *liable to the general body, for any losses sustained by reason of* such misrepresentation, than to visit, upon legatees, the consequences of those misrepresentations.”(r)

The above cases have been dwelt upon in great detail; but not, it is conceived, at a length which will be found useless, for the judgments seem to contain much to elucidate a variety of subjects of great importance, both to directors and shareholders, in banking companies;—the effect of powers given to directors in deeds of settlement; the liabilities incurred by shareholders; the extent of the powers and the liabilities of directors; the effect of representations made by directors to executors, in reference to the testator’s interest in their company, &c.—are treated in such an explanatory manner, and placed in such clear lights, as to justify, it is thought, the occupying more space with the discussion, than might, at first sight, seem to be desirable.

By shareholders, or members of these companies, it ought never to be forgotten, that the interests of the body of directors frequently clashes with, and is not seldom directly opposed to, the interests of the general body.

When, therefore, the shareholders execute deeds of settlement, containing clauses similar to that above cited,(s) giving “full power to the court of directors to allot, appropriate, reserve for, or dispose of, the shares, to such parties, and upon such terms, and in such manner as they may think fit;” the measure is one which the shareholders ought to be fully impressed with the importance of, conferring, as it seems to do, so vast a power upon the body of directors. But the power entrusted seems to be much increased by a subsequent provision in the same deed, “that the management of the company, and the business and concerns thereof, and the regulation, investment, and application of the properties, funds, securities, and money, for the time being, belonging *to the com- [*537] pany, and the regulation and determination of the modes and terms of carrying on and transacting the business of the company, and other matters and things whatsoever connected with, or relating to the business and concerns of the company, shall be solely and exclusively vested and reposed in the court of directors, except as herein excepted, or otherwise provided;”—and, still further, by another clause, “that the court of directors may alter, vary, or transpose the properties, funds, securities, or moneys of, or belonging to, the company, or any of them, or any part thereof, as they should think fit, and may make and give such

(r) 2 De G., M. & G., 535.

(s) See *supra*, p. 529.

orders in regard thereto, and also for the sale or other disposition of the said properties, funds, securities, or moneys, or any part thereof, as to the court of directors shall seem meet."

Now, more unqualified powers can hardly, perhaps, be conceived. The directors, it will be observed, are not hampered in their dealings with the "property, funds, securities, or moneys" of the company. Even by the restriction, that they shall be disposed of in the way that may seem best for the welfare and prosperity of the body, no reserve appears to have been made of questions upon which the directors should not be at liberty to act, without consulting a general meeting of the shareholders; all is left wholly unguarded, unlimited confidence appears to have been reposed.

Notwithstanding, however, that the deed conferred such large powers, the court treated the conduct of the directors as a fraud upon the general body of the shareholders; for the directors were aware, that without the aid of the fictitious capital represented by these "credit shares," there was no other way, in which it was possible for the concern to have gone on.

If, for instance, at the first meeting of the shareholders, the directors had only represented the capital which was actually paid up, this company, it is clear, must have stopped at once, and that, in that case, the [*538] directors would have lost *all their power and fancied benefit; but, by misrepresenting the real, *bonâ fide*, state of the concern, they led on the persons whose interests it was their duty to have protected, and a Court of Equity cannot allow any of the parties to such misrepresentation to escape from that common calamity, of which they themselves have been the authors.^(t)

Binding Shareholders.—The directors of the Royal Bank of Australia issued promissory notes in this form:—

"The Royal Bank.

"We, directors of the Royal Bank of Australia, for ourselves, and the other shareholders of the said company, jointly and severally promise to pay for value received on account of the company."

This was signed thus:—

"A. B., Chairman,
 "C. D., }
 "E. F., } Directors.
 "Of Australia."

This attempt to bind the shareholders severally was held to be *ultra vires* of the directors, and, consequently, in that respect void; nevertheless, assuming that the parties signing the note were authorized to sign promissory notes on behalf of the company, this note bound the company, as it sufficiently showed an intention to do so.^(u)

It is to be observed, that nothing here laid down conflicts with the

^(t) Meux's case, 2 De G., M. & G. 521.

^(u) Maclae v. Sutherland, 3 E. & B. 1, where see deed of settlement of Bank of Australia set out, *id.* 4; see 14 M. & W. 469.

proposition already stated on the highest authority,^(x) that in banking copartnerships, directors, as such, have power to borrow money, for the *ordinary* purposes of the banking business, so as to bind the partnership, unless the power is expressly excluded by the terms of the deed: all that was determined in this respect, was this—directors *of a banking copartnership have no implied authority to borrow in *that manner*, so as to bind the partnership. [*539]

The Royal Bank of Australia stopped payment in 1848; in an action, (which came on to be tried in 1852,) by the holder, on certain notes of the above form,^(y) which were at five years' date, and attached to each, and on the same paper, were coupons, for half-yearly interest, at the rate of 5l. per cent., till the principal would become due, and which had been issued, through a broker, employed by the directors, and for which the plaintiff had paid the full value, and sought to recover from certain of the directors, the amount, &c.;—it was held, (on a special case, stating the above facts, and also that in the advice notes, from the broker to the plaintiff, the transaction was called a "Sale of Debentures;" that the documents appeared sometimes to have been called by the company's agent, "Deposit notes;" and that the money raised by means of these notes was employed as capital in starting branches of the bank in the colonies,)—that the real nature of the transaction was, in substance, a loan to the bank, on the security of the notes; and *assuming that the directors had authority to contract such loan on behalf of the company*, it might be recovered by the plaintiff, against the shareholders, as money lent; but that the transaction was so much out of the *ordinary* course of banking business, that authority to bind the partnership could not be ascribed to the directors *as such*; an express authority would be necessary; their implied authority, to do all that is in the ordinary course of banking business, would not suffice to establish their power, to bind the partnership, in this mode; the deed of settlement, however, was considered to have given authority to set up branch banks in the colonies, and to borrow money for that purpose, in the mode adopted; and the shareholders, it was also held, must be taken to have ratified what had been done, it appearing to the court, as a fact, that at successive annual meetings of the *shareholders, it was known that the capital, for this purpose, had been borrowed.^(z) [*540]

The same deed of settlement, (dated August, 1840,) provided that the trade of the company should be that of banking, including the issuing of bank notes and bills, payable on demand after sight, after date or otherwise, and the making of loans and advances to customers, and other persons, on real or personal security, on sheep, cattle, &c., and on every other kind of property whatsoever, including the discount of bills of exchange, &c., the borrowing or taking up money at interest on inland or foreign bills of exchange, or promissory notes, bonds, debentures, deposit receipts, or other obligations, as should from time to time be deemed

(x) Bank of Australasia v. Breillat, 6 Moo. P. C. 194; supra, pp. 525, 526; see 3 E. & B. 39.

(y) See supra, p. 538.

(z) Maclae v. Sutherland, 3 El. & Bl. 1; see Com. Dig. Merchant, F. 2, F. 15.

expedient. Large discretionary powers were also given to the directors to invest, convert, re-invest, and vary the property, funds, &c., of the company.

The capital of the company was to consist of 1,000,000*l.*, and to be raised by 30,000 shares of 50*l.* each.

A large proportion of the shares allotted was taken by the directors themselves; but of the calls made upon these shares, little or nothing was ever paid by the directors.

In addition to the funds raised by the allotment of shares to other persons, the directors borrowed large sums of money upon debentures, or notes, in the form already stated.^(a)

The moneys thus raised were in part drawn out, and in part sent out to one of the directors, who, under powers of attorney, and a commission from his co-directors, had gone out to Australia, and there entered into large agricultural and other speculations, instead of employing the moneys in the banking business.

The company suspended payment in 1848; on winding up its affairs, [541] claims by the holders of these instruments *were held to be rightly admitted as debts against the company; for that the powers given by the deed were large enough to authorize the directors to borrow money on such instruments, and that the notes were so framed as to form a contract binding on the company.^(b)

Transfer of Shares.—In another case, on the same deed of settlement, the court considered the effect of the following clause:—

“That whenever by any means whatsoever any share shall become forfeited, or shall be duly and effectually transferred to a new proprietor, then in such case, and not before, the responsibility of the former proprietor, as a proprietor in respect of such shares, shall cease and determine, and such former proprietor shall be exonerated and released from all subsequent claims, demands and obligations in respect of the same shares, and from all future observance and performance of the covenants, rules, regulations and provisions affecting, or which ought to be observed or performed in respect of such shares; and the entry of such forfeiture or transfer in the share register book shall be, and be accepted, legal evidence of such forfeiture or transfer.”

These expressions were interpreted, in equity, to mean, that where a purchaser of shares is, upon the transfer, accepted as purchaser by the directors, and the transaction is completed, the seller of the shares is to be considered as discharged, as from the beginning and entirely, as between him and the purchaser, and, as between him and the company.

In such a case, a transferor is not a contributory on the winding up of the company;^(c) nor is a person who, being an allottee of shares paid his deposit and calls, but did not execute the deed within the time limited, on the directors declaring his shares forfeited in consequence, has sub-

(a) See *supra*, p. 538.

(b) In *re Royal Bank of Australia*, (Walker's case,) 18 Jur. 885, where see clauses of deed.

(c) In *re Royal Bank of Australia*, (Sutton's case,) 3 De G. & S. 262.

mitted to the forfeiture, and never made any claim upon the company.^(d)

*Generally, directors have no power to cancel shares. Even where the deed of settlement provides that in all cases, not provided for by that or any other supplemental deed of settlement, the directors may act in such manner, as to promote the interests and welfare of the company: this does not enable them to cancel a retiring director's shares, so as to exempt him from liability; and ten years after he was held to be a contributory.^(e) [*542]

The same deed of settlement provided, that the directors should have power to enter into any contract with any persons, respecting any matter in which the company might be interested, and also to enforce the same, &c., and afterwards, to release and discharge, or modify and vary the terms of any such contract, &c., and to compromise, compound, and settle any action, suit, claim, or demand, in which the company may be interested, upon such terms, and in such manner, as the court of directors might think proper. The deed also empowered the court of directors to purchase, for the use of the company, any shares in the company; the shares which should be so purchased, to be considered part of the property and effects of the company, and be held and applied accordingly.

The deed also required and empowered the court of directors to determine the form of the transfer of shares, and to make orders and regulations respecting the same, and declared that all sales and transfers not made conformably to the existing regulations in that behalf, should be invalid in law and equity.

These terms were held, in equity, to authorize the court of directors to accept the resignation of one of their own body; and afterwards to release him from his shares which he had taken, and to hand back to him a promissory note, which he had given in respect of those shares; the resignation of the office of director and the relinquishment of the shares being distinct acts, the latter, subsequent to the *former, and there being no suggestion of fraud, or of the company having [*543] been in failing circumstances at the time.

It was also held, that the omission of the forms of transfer prescribed in, or by virtue of, the deed of settlement, did not invalidate the transaction; such omission not arising from any fault on the part of the vendor.^(f)

"The directors of these companies are, in a sense, trustees, and have authority to bind the company to the extent of the powers given them by the deeds, under which the companies are constituted; but in the absence of previous authority, or of subsequent concurrence, on the part of all the shareholders, the directors have not, as I apprehend, any authority to bind the companies in any matters of substance, beyond the extent of the powers the deeds may give them. Moreover, in the exercise of the powers given them by the deeds, they must, as I conceive, keep within the proper limits. Powers given them for one purpose cannot, in my

(d) *Ex parte Beresford*, 2 Mac. & G. 197.

(e) *Stanhope's case*, 3 De G. & S. 198.

(f) *In re Royal Bank of Australia*, (*Cockburn's case*), 4 De G. & S. 177.

opinion, be used for another and different purpose. To permit such proceedings on the part of the directors of companies would be to sanction not the use, but the abuse, of their powers; it would be to give effect and validity to an illegal exercise of a legal power,"(g)

Now, particularly with reference to the transfer of shares, questions arise, which the remarks just offered are calculated to dispose of. Thus, there may be provisions in a deed of settlement, empowering directors to consent to transfers of shares; but if the terms of those provisions and the context show the sense to be, that the directors are to take into consideration each proposed transfer, then the deed will not authorize them permitting the retirement of a body of shareholders at once; for whether they shall go out together, is a question involving many considerations, which would not apply to the retirement of an individual shareholder, [*544] and *which the provisions respecting separate transfers would, probably, not be found so framed as to authorize the directors to entertain.(h)

And as directors cannot sell their right, as given by the deed of settlement, of objecting, on behalf of the company, to any proposed transfer of shares, so they cannot exercise the right of giving their sanction to such proposed transfer, for the purpose, and upon the condition, of obtaining payment of a debt already due to the company from the intended transferor of the shares.(i)

In the case of ordinary partnerships, a partner can retire and withdraw his capital from the concern only upon a dissolution of the partnership; and it is upon taking the general partnership account between the parties, that the right of setting off the debt of each partner, in account with the partnership, arises.

The essential distinction between a banking copartnership, on a large scale, and an ordinary common law trading partnership, consists in the power and privilege which, by the provisions of the deed of settlement of the former, are given to a proprietor to retire and withdraw his capital from the concern, without a dissolution of the partnership, by transferring his shares. This power and privilege constitute very main inducements to the investment of capital in such concerns, and thereby enable the society, or partnership, to raise a capital and carry on transactions, which it would be impracticable to raise, or carry on, upon the basis of an ordinary mercantile partnership. The consequences which, as between a shareholder and the company, arise, by operation of law alone, upon a transfer of shares, cannot, therefore, be inferred, from those which attach upon the dissolution of an ordinary partnership. The consequences arising upon a transfer of shares must be sought for in the provisions of [*545] the *deed of settlement, or in some rule of law not repugnant to those provisions.(k)

The deed of settlement of a banking copartnership declared, that no

(g) Per Turner, Ld. Just., in *Ex parte Bennett*, 24 L. J., Chanc. 134.

(h) See 24 L. J., Chanc. 134. Acceptance by directors of re-transfer of shares, *Walter's case*, 3 De G. & S. 244.

(i) *Pinkett v. Wright*, 2 Hare, 120.

(k) Per Turner, V. C., 2 Hare, 130, 131.

transfer of shares should be permitted, except upon notice to the directors, and on the consent thereto of a board of directors, such consent being signified by a certificate, in writing, signed by three directors, at the least; if such consent were refused, the shareholder might require the directors to buy his shares at the market price of the day. After a consent given, the name of the transferee was entered in the share register book, and the entry there was conclusive against him. No shareholder could compel an inspection of the books of the company; they were expressly excluded from this by the deed.

These being the principal provisions of the deed, as to this matter, A., a shareholder, proceeds to transfer his shares to various persons, and sends the proper notices to the directors; receives back consents, signed by three directors, respectively; and completes the transfers; the transferees' names were entered in the share register book; and, in the return made to the inland revenue, the name of A. is omitted from the list of shareholders, and inserted in the list of those who had ceased to be shareholders. The transferees afterwards received the regular notices of meetings of shareholders, &c.

The directors, subsequently, sought to impeach these transfers, on the ground of the notices never having been submitted to a *board of directors*, nor the consent given by a *board* of directors, as required by the deed, but that the consents had been signed by the managing director, and then signed by two other directors. This appeared to have been the mode of transacting this description of business ever since the formation of the company.

The House of Lords decided, that the directors could not, on the circumstances, set up their own want of observance of *the formalities required by the deed, as a ground on which to fix A. with [*546] liability, as continuing to be a shareholder, for that they were bound by their course of dealing.^(l)

It is to be observed that, on the same facts as those just stated,^(m) (except that the register was excluded,) a court of law had previously held A. to remain a shareholder, as to creditors of the bank, as there was no consent by a board of directors, and, considering that the irregular mode of transfer, though adopted for some years, was wholly ineffectual, and, consequently, that A. remained a shareholder, as to creditors of the banking copartnership.⁽ⁿ⁾

The question before the House of Lords, however, was, whether the directors could take advantage of their own laches to comply with the requirements of the deed of settlement, and treat A. as a member, when, but for their own conduct, there would have been no pretence for doing so.

It much behoves a shareholder, therefore, who wishes to transfer, to see that all the formalities, which may have been imposed by the deed,

(l) *Bargate v. Shortridge*, 5 H. Lds. 297; see 7 M. & W. 574.

(m) See *supra*, p. 545.

(n) *Bosanquet v. Shortridge*, 4 Exch. 699; see 5 H. Lds. 305, 313, 314, 322, 323.

on the transfer of shares, be complied with, otherwise he may remain liable to creditors, though, it seems, he would not be so for calls.

One duty of a copartnership, i. e., of its directors, obviously is to keep correct transfer, and share register books, &c., because they are required, by the statute, to make returns, from time to time, of their existing, and also of those persons who have ceased to be, members; and they never can perform that duty, according to the intention of the act of parliament, unless the books are correct.^(o)

The case, in the House of Lords, does not touch the principle, that when directors do an act which is clearly not within their power, and to [547] which they never could, by any form, or any ceremony, have given vitality, such an act is perfectly void, and cannot be maintained.^(p)

Directors, who, having the means of seeing that all the formalities of transfer required by the constitution are complied with, neglect to do so, allow there to be a want of formality in the transfers of their own shares, remain contributories with respect to them.^(q)

A shareholder is not bound to have a knowledge of what is contained in the books of the company; nor is bound by acquiescence in the entries in those books.^(r)

Enhancing Prices of Shares.—In addition to the cases which have been cited,^(s) showing the effect of proceedings, by the directors, for the sake of “sending up” the shares in the market, another attempt, of the same kind, may be stated, in case of a bank copartnership, at Calcutta, which was contrived in this way:—

One of the directors prevailed upon several persons to join him, for the purpose of buying shares of the bank; they applied to the bank for a credit, on their joint and several securities, to be opened for the purpose of purchasing these shares; this was granted by the directors; the account was operated on, by drawing on it for the payment of the shares, when bought, and paying into it, when money was raised on the shares, and elsewhere; a total loss ensued; the bank failed; the director, with the parties who had joined him in the speculation, being debtors to the bank to an immense amount.

Now, in this case, two points were obvious:—

First, the deed of settlement expressly prohibited loans being made without any security; here the advances had been made with no security, in the sense of the deed; the transaction of the opening [548] the credit was, therefore, a breach of trust, in one and all the directors concerned, and a breach of trust of no ordinary importance, because it is manifest, that such a prohibition must constitute the chief safeguard for the shareholders, that their capital shall not be perilled.

Secondly, the purpose for which the money was so to be lent to these persons, was to be applied for the purchase of the bank shares, at a certain price,—it was intended, clearly, to raise the price of the bank shares out

(o) Per *Ld. St. Leonards*, 5 H. Lds. 318, 319.

(p) 5 H. Lds. 328; see 1 De G., M. & G. 589.

(q) *Ex parte Brown*, 19 Beav. 97; *Ex parte Henderson*, *id.* 107.

(r) See 19 Beav. 104.

(s) See *supra*, p. 528, et seq.

of the moneys of the bank itself,—to create for these shares a false demand, the end being to deceive the shareholders and the public. Now, no circumstances of embarrassment, no difficulty, can excuse portraying in false and delusive colours, the condition of the affairs of the bank entrusted to the charge of the directors; no hope of saving a falling company can justify a violation of the deed, by misappropriating the funds committed to their care in such manner.^(t)

Directors, fraudulently inducing a person to purchase shares, may be personally liable to such person;^(u) but, to prove fraud against *them*, does not tend to fix the shareholders, in general, with fraud; a person clearly showing the latter would, probably, escape being made liable as a contributory; but the directors are not the agents, of the shareholders, to commit a fraud; and the directors' fraud is no reason, in itself, why a person should not be placed on the list of contributors.^(x)

The same rule obviously holds, where the fraud has been that of the manager, who is accredited by the directors.^(y)

A misrepresentation of the state of the concern, made by the law agent of the company, whether he was or was not a partner in it, does not release from obligation, in respect to *shares, a person, who purchases shares, after such representation, although it was wholly [549] incorrect and untrue; for the law agent is not the agent of the company, to bind it in such matters, as the representation related to.^(z)

Directors representing, with the intent to raise the shares of the company in price, in their reports, and by their agents, that the affairs of the company are in a very prosperous state, and declaring large dividends, at a time when those affairs were greatly embarrassed, and thereby inducing a person to purchase shares, may be made criminally responsible for their conduct.^(a)

Winding up.—In case it be asked, whether any, and what means exist, on behalf of the shareholders, of enforcing their duties upon the directors of a banking copartnership, it is answered, (and it seems to be nearly all there is to answer, for, in truth, shareholders have few practical means for effecting this result,) that, in certain cases, the courts of equity will decree an account.

Thus, where the company had suspended business for several years, but was not dissolved; large debts were due from the company, for which the shareholders were liable; considerable assets were in the hands of the directors and trustees of the company, though not equal to the debts; all the directors, except one, had become bankrupt, and had thereby, by the regulations of the deed of settlement, become incapable of acting, and the trustees refused to act; certain shareholders, who had paid all the calls that had been made, were allowed to bring a bill for an account against the directors, *and* the trustees, *and* the public officer, *and* the shareholders who had not paid up their calls, praying that an account

(t) In re Grant, 7 Moo. P. C. 141.

(u) Ex. gra. Stainback v. Fernley, 9 Sim. 556; see 2 H. Lds. 509.

(x) Dodgson's case, 3 De G. & S. 90, remarking on Sanderson's case, id. 66.

(y) Bernard's case, 5 De G. & S. 289.

(z) Burnes v. Pennell, 2 H. Lds. 497.

(a) 2 H. Lds. 509.

might be taken of all the partnership assets, and that such part as was [*550] outstanding might be got in by a *receiver, and that the whole might be converted into money and applied towards satisfaction of the partnership debts, *without* praying for a dissolution of the copartnership: the object of the bill being, not to obtain a share of the profits due to the plaintiffs, but to have the common assets realized and applied to their legitimate purposes, in order that the plaintiffs might be relieved from the responsibility to which they were exposed, contrary to the provisions of the contract into which they had entered, and to every principle of justice.(b)

This was, in fact, a proceeding for the purpose of winding up(c) the affairs of the company, and was before the legislation known as the Winding-up Acts; but, it seems, that such a proceeding may be resorted to, with effect, since those acts, at any rate where the bill seeks relief, which could not be had under a winding-up order.(c)

So the company, by its public officer, may institute a suit in equity against a director, or directors, who have misconducted the company's affairs.(d)

The joint-Stock Companies Regulation Act, 19 & 20 Vict. c. 47, does not affect banking copartnerships or other bodies associated for the purposes of banking; therefore, the winding up of such bodies still proceeds under the old Winding-up Acts.

If, pending a suit by the shareholders of a banking copartnership against the directors, one of those directors obtains an order for winding up the affairs of the company, under the Winding-up Act, 1848, and then, after some time has elapsed, the shareholders move, that all further [*551] proceedings in the suit be stayed, until the affairs of the company *had been wound up, under the order, their motion will be refused with costs.(e)

The object of the suit, which was instituted in 1842, was, in fact, the winding up of the affairs of the company, and for the purpose of charging the directors with sums, which, but for their wilful default, they might have received, and with other misconduct, &c., and seeking an injunction, &c., and the delivery up of certain promissory notes. And it was considered to be clear, the winding-up order was not adapted to give as much relief as was to be had in the suit.(f) In fact, it was held, that the suit must necessarily be disposed of before the winding up could take place.(g)

(b) *Wallworth v. Holt*, 4 My. & C. 619, 634, 636; see *Barker v. Buttress*, 7 Beav. 134, 137; and see 15 Jur. 853; *Richardson v. Bank of England*, 4 My. & C. 165.

(c) See *Deeks v. Stanhope*, 1 Sim. N. S. 439; S. C., 15 Jur. 618; cor. Ld. Cranworth, V. C.

(d) *Harrison v. Brown*, 5 De G. & S. 733; see 1 De G., M. & G. 590.

(e) *Deeks v. Stanhope*, 1 Sim. N. S. 439. The bill by the shareholders against the directors was by leave of the court (five times granted) amended so often. The suit had pended nine years.

(f) See 1 Sim. N. S. 448, 449; 11 & 12 Vict. c. 45, s. 14.

(g) In *re St. Marylebone Banking Company*, 1 Hall & T. 100, 103; see 1 Sim. N. S. 449; 14 Sim. 57. The pendency of a suit is not an objection to courts making a winding-up order, 11 & 12 Vict. c. 45, s. 58.

On the other hand, after steps have been taken, under the Winding-up Act of 1848, and proceedings have gone so far as the appointment of an official manager, no creditor or other person can commence or proceed with any action against the company, or any other person representing the same, &c., except so far as the master shall permit, &c.: and a judge at chambers may order, further proceedings to be stayed.^(h)

But an action against a party, sued individually, as one of the joint and several makers of one of the promissory notes of the Royal Bank of Australia, was held, not to be a case within that enactment; it was considered to be just the same case, as if the defendant had been sued upon his promissory note, made by him in his individual character, and having no connection whatever with the company; he was held to be personally liable on the promissory note.⁽ⁱ⁾

**Dividends.*—The payment of dividends, derived from other sources than the profits of the company, is a fraud on the part [*552] of the directors; for, dividends are supposed to be paid out of the profits only, and when directors order a dividend to any given amount, they, without expressly saying so, yet, impliedly, do declare to the world that the company has made profits, which justify such a dividend. This is a gross fraud, for which they are liable to be punished.

In case any one, in consequence of *such implied misrepresentations*, buys shares, and, it appearing, that the concern is failing, &c., he is injured, he may proceed against the directors by action; they are liable, also, to be indicted in such case: even if no one can be shown to have been injured, as a matter of strict law, they are liable to indictment for a conspiracy.^(k)

But this alone would not be sufficient to enable the party to set aside the contract as against the directors; it is not enough for him to say, “unless you had, by paying dividends, thereby making the public believe you were paying them out of profits, given this flourishing appearance to the concern by your own acts and deeds, I should never have bought my shares:” such a general averment of fraud is not enough; it must be *dolus dans locum contractui*.^(l)

On the other hand, no man can complain that another has too implicitly relied on the truth of what he has himself stated,^(m) and where one of the parties to a negotiation induces the other to contract, on the faith of representations, any one of which is untrue, the whole contract is to be considered as having been obtained fraudulently,⁽ⁿ⁾ and the party making the representations may be compelled to make good the representation, if that be possible; if not, the person *deceived may avoid the contract: and it does not signify that the party making the [*553]

(h) 11 & 12 Vict. c. 45, s. 73.

(i) Penkivil v. Connell, 5 Exch. 381, 384, 385; MacLae v. Sutherland, 3 El. & Bl. 37; see 3 Exch. 3, and form of note, sup. p. 538.

(k) Burnes v. Pennell, 2 H. Lds. 524, 525.

(l) Burnes v. Pennell, 2 H. Lds. 530; see Jennings v. Broughton, 22 L. J., Ch. 585; S. C., 17 Beav. 234.

(m) Dobell v. Stevens, 3 B. & C. 625.

(n) Reynell v. Spry, 1 De G., M. & G. 660.

representation believed it to be true, if it was his duty to have known otherwise.(o)

Hence, a representation by directors, in a prospectus, on the formation of a company, is a representation, *dans locum contractui*, as regards persons taking shares, and the contract may be avoided, if it be impossible that the representation can be made good.(o)

Forfeiting Shares.—The subscription contract of a projected banking company, after reciting that the capital was agreed to consist of 1,000,000*l.*, with power to increase it to 3,000,000*l.*, and that application had been made to the crown for a charter, nominated certain persons to be directors, until the charter should be obtained, with power for them to regulate the terms of the charter, in such manner as they should think necessary, in compliance with the regulations of the government, and to narrow or extend the objects of the company, as might be necessary for that purpose.

The directors were also empowered, as soon as the charter was sealed, to prepare a deed of settlement, to call for a first instalment from the subscribers, and to declare forfeited the shares of any subscribers who did not execute such deed of settlement.

The charter that was obtained incorporated the company, with a capital of 644,000*l.*, and power to increase it to 1,000,000*l.*, with the consent of the lords of the treasury.

Then a call was made, and a deed of settlement prepared, which recited the charter, the call, and its payment, by the parties to the deed.

On these facts it was very solemnly decided,(p) that the power of the directors was not terminated on the grant of the charter; that the charter [*554] was not inconsistent with the subscription *contract; that the call was properly made; that the deed of settlement was binding on the subscribers to the subscription contract; but that as the deed of settlement made recital of the payment of the call, and the power to forfeit shares subsisted only for the non-execution of the deed of settlement, therefore the directors had no power to forfeit for non-execution of the deed.(p)

Cheques.—Directors sometimes keep blank cheques, with their signatures already set to them in the cheque-book, the requisite amounts being filled in as the cheques are wanted.

It is most important to be known, that for a secretary or clerk, or any one connected or unconnected with the company, to fill up, *without authority so to do*, such a cheque, with a sum in favour of himself, even though the sum might be owing to him from the company, is most probably forgery.(q)

Bills of Exchange.—Directors accepting a bill of exchange in their own names, simply, without saying that they do so as agents of the

(o) *Pulsford v. Richards*, 17 Beav. 87; *Jennings v. Broughton*, id. 234.

(p) *Norman v. Mitchell*, 5 De G., M. & G. 648, cor. the Lords Justices and Cresswell and Erle, J.J.; see 14 Q. B. 781.

(q) See *Flower v. Shaw*, 2 Car. & K. 703; see *Reg. v. Wilson*, 17 L. J., Mag. C. 82.

copartnership, will be personally liable on the bill, whether they have, or have not, authority to accept bills, on behalf of the company.^(r)

So, if directors sign a joint and several promissory note, they will be personally liable, whether they have authority or not, to issue promissory notes; if directors, "for themselves and the other members of the company, jointly and severally promise," &c., such an instrument may bind the body of the copartnership, *i. e.*, the whole of them jointly, but cannot bind them severally.^(s)

*In questions of this kind it sometimes is useful to bear in mind the principle, that a bill of exchange cannot be addressed [*555] to one person and accepted by another.^(t)

Contracts.—Directors will not be liable, as on a contract, in such circumstances as the following:—

An extraordinary general meeting of proprietors is duly called, and passes resolutions, putting an end to the partnership—that being the purpose of the meeting,—and the object to be effected by the resolutions—the company is dissolved; whereby the authority of the directors to bind the other shareholders is put an end to; it becomes necessary, therefore, to make arrangements for realizing the assets, and discharging the liabilities of the company, and dividing the surplus. Without such an arrangement any one of the shareholders might receive payment of the debts due to the company; each shareholder would have to concur in the indorsing and disposing of the securities of the company, and in settling the engagements into which they had entered, during their partnership: the course the meeting took was, to place the winding up of the concerns in the hands of a few members, who were most able and qualified for the purpose, namely, the late directors.

But members taking upon them such a trust do not, though they join in resolutions, providing that the assets shall be realized, and as soon as they are so, dividends shall be declared and paid, by the act of taking upon them the trust simply, bind themselves to declare and pay, &c. the dividends; and a shareholder, to whom, on assets being realized, a dividend is in point of fact due, cannot sue those persons, as upon a contract, at law, in order to recover the dividend.

Those persons, however, might be liable in equity as trustees for the shareholders, but only as bare trustees, not as being bound by their own contracts, in the terms of the *resolution; and although it should appear that a sum of money, in respect of realized assets, were [*556] actually in their hands, and though they should have actually declared a dividend of so much in the pound, to be paid on condition of their being indemnified, &c., that would not entitle any shareholder to sue them at law, as for money had and received, to his use, in respect of the proportion due to him at that rate on his share.^(u)

Liabilities of Shareholders.—Partners who are desirous of escaping

(r) Byles on Bills, 6th edit. 26, 54; Nicholls v. Diamond, 23 L. J., Exch. 1; and see Fox v. Frith, 10 M. & W. 131.

(s) MacLae v. Sutherland, 23 L. J., Q. B. 229.

(t) Davis v. Clark, 6 Q. B. 16.

(u) Lyon v. Haynes, 5 M. & Gra. 504.

from an undertaking of this kind, which turns out unsatisfactorily, may, in some cases, hope to do so by means of the Winding-up Acts. An application may be made for a winding-up order, in cases where it does not appear that there are any creditors of the company. *That* is not at all essential to found the jurisdiction under these statutes; they are not confined to companies which have creditors; their object is not merely to pay the debts of the companies; but to enable those who have entered into these speculations, to escape from them as far as possible.

On the other hand, the statutes were not intended to apply to a body which was going on with fair prospects, in the exercise of its trade, or business, so as to enable *any* dissatisfied member to call upon the courts to grant a winding-up order. Evidence must be given, that the company in question cannot carry on the business, and that the difficulties are found to be insuperable in disentangling the parties from the the concern in which they are engaged; that will show a state of things to which the Winding-up Acts apply.(x)

When a deed of settlement renders necessary the performance of certain acts, before a person can be a member of the copartnership; the case [557] usually is, that the acts are *for the benefit of the body, and the non-performance of them does not enable the party to retire from his contract with the company.(y)

In practice it is not found to be sufficient, for the purpose of enabling members to retire, who may wish to do so, upon discovering the affairs of the body are becoming unprosperous, or when they become dissatisfied with the management, and are unable to influence the course of it for the better, that there should be contained in the deed of settlement provisions enabling the company to become purchasers of shares, with the consent of a general meeting of shareholders, and for shareholders procuring persons to be transferees of their shares, with the consent of the directors; because, in general, one or other of these consents it is found impracticable to obtain.(z)

It is not even sufficient for this purpose, to introduce powers for the directors to act, in all cases not provided for by the deed, in such manner as to promote the interests and welfare of the company; and, although the directors in such case assume the power to allow a member to retire, and profess to release him from liabilities, yet, if this be inconsistent with express prohibitions in the deed, he may be liable for debts of the company, in equity, even ten years after his supposed retirement has taken place.(a)

We must remember that in common law partnerships, retirement of one or more members can only be made with consent of the whole, and

(x) In re St. Marylebone Banking Company, 1 Hall & T. 102, 103, cor. Ld. Cottonham, C.; 11 & 12 Vict. c. 45, s. 5, art. 7. To a bill for the dissolution of such copartnership, all the members must have been made parties, *Abraham v. Hannay*, 13 Sim. 581.

(y) *Burnes v. Pennell*, 2 H. Lds. 496.

(z) See *Ex parte Bennett*, 24 L. J., Chanc. 131.

(a) In re St. Marylebone Banking Company, (*Stanhope's case*), 3 De G. & S. 198.

upon a dissolution of the partnership ; in these copartnerships the shares are made transferable, but how transferable? commonly, by the consent of the directors. Now, the directors are trustees for the shareholders, and cannot depart from the terms and spirit of the deed of settlement, which imposes the trust upon them. *Can it be *supposed*, or [*558] *presumed*, to have been in the contemplation of the parties who originally agreed to the deed, that the directors should sell that consent, or, in other words, sell their right of objecting to any person who might be proposed as transferee of a member wishing to retire? It can seldom, or never, be for the real interests of the body, that they should be allowed to do so.(b) It is not wholly unlike bribing the servant to allow the master to be cheated.

One ground is this : a person becoming a member of a copartnership, upon false representations made not to him alone, but to him and other members, cannot be entitled, on that ground, to a decree, for the repayment of his subscriptions, to which the other members would not be equally entitled, and if he be entitled to such repayment, he cannot obtain that relief in the absence of the other members ; and that absence will not be sufficiently accounted for, by alleging in the bill that the complainant is ignorant, and unable to discover who the other shareholders were, at least, when it appears also on the bill, that the deed of settlement of the company is enrolled in court, that the plaintiff had seen the deed, and what were the number of shares which were subscribed for thereupon.(c)

Even if the complainant has not this common interest with the other members of the company, if he alleges that he alone has been inveigled into becoming a member by misrepresentations, which apply to himself alone, still he must make all the other members of the company parties to the bill, in order to examine these questions, for when he asks to have his capital restored, he asks that the interests of all the other partners of the company may, to the extent of the withdrawal of his capital, be prejudiced.(c)

This requirement will, obviously, in many cases, present a formidable, and, perhaps, an insuperable difficulty ; and, *at any rate, one [*559] which can only be overcome by a considerable expenditure of time, labour, and money.

Again, in many cases, the terms of the deed of settlement do not give powers to the directors to authorize the retirement of a *body* of the shareholders, so that an agreement entered into by the directors with such members, that on the payment by them of a sum of money, in discharge of all their liabilities, they should be allowed to retire, transferring their shares to two persons named by the directors—in fact, two of their own body—was wholly *ultra vires* of the directors, and could not be supported ; and the shareholders, notwithstanding, remained liable to the debts of the company.(d)

(b) See 24 L. J., Chanc. 133.

(c) *Macbride v. Lindsay*, 9 Hare, 574, 584, 585, 591.

(d) *Ex parte Bennett*, 24 L. J., Chanc. 130. Upwards of 3,000 shares had been transferred as stated in the text.

Another case, showing the difficulty of divesting the responsibilities of members of a copartnership of this kind, occurs, in which the facts were these :—

Mr. Davidson was manager, at Ludlow, of the branch bank established there of the Commercial Bank of England; Mr. Hannay was manager, and also shareholder in the Borough of St. Marylebone Banking Company.

Hannay induces Davidson to subscribe the company's deed of settlement for one hundred shares; this was done, as the court judicially inferred, from the evidence, for the purpose of enabling and accrediting a fallacious representation, that Davidson had taken, and was the holder of, those shares on his own account, and at his own risk; whereas, the fact was, that it had been arranged, for Davidson merely to allow his name to be placed on the list of shareholders, as owner of these one hundred shares; that all the shares which should not be transferred, by him, to other parties, should be transferred, for him, by the directors, and that he should receive nothing, nor incur any liability in respect of the shares: it was agreed that the shares should remain the property of the company.

[*560] *Whilst these one hundred shares so stood in Davidson's name, thirty of them were disposed of by him; the purchase money was paid to the directors; afterwards, he transferred the residue to Hannay, and his successors, in office, in trust for the directors. Davidson never paid any call, or other sum of money, upon, and never received any dividend or other sum of money, in respect of the shares; his name was never included in any return to the Inland Revenue Office, as a member, nor did his name stand on any list, or register of members filed at the said office.

The object of this proceeding was considered by the court to have been,—that of inducing and encouraging the taking of shares, by persons whom Hannay, or the directors, might think it advantageous, or useful, to add to the company, and as such, unfair, and tainted with deceit.

Accordingly, eight years after the last-mentioned transaction, Davidson was held to be the true proprietor of the seventy shares, for every purpose (as between him and the other proprietors.)^(c)

Contributories.—It must be carefully borne in mind, with reference to all cases of contributories, that the liabilities of contributories are not always equal; each contributory is not always liable for the whole expenditure of the company; in all the cases respecting contributories, all that is decided, when the court orders that such a person shall be placed on the list of contributories to such a company, is, not that he is necessarily in precisely the same situation, with respect to pecuniary responsibility, as every other person who has been, or may be, placed upon the same list, but only that, in respect of shares that he holds, or has held, (as his case may be,) he is liable to bear some share or other in aid of the liabilities of his fellow members of, or debtors to the company.

(c) In re Marylebone Banking Company, (Davidson's case,) 3 De G. & S. 29.

What he must eventually pay, as his proportion *of the losses, remains for further investigation, and the result depends on the number of shares he has held, on the mode in which they were transferred to him, &c., the time during which he has held them, and a variety of other circumstances, and combinations of circumstances, differing in almost every particular instance. (f)

The Banking Act (g) has no bearing on the question of who are contributories. The Banking Act grew out of the following state of things:—“There being great difficulty in arranging the liabilities of a fluctuating body, where the parties, whom a creditor had sue as liable, at the time of the contract, might be altogether different from the parties having the benefit of the contract, this statute, while its object was to permit banking companies to be established, intended to provide that those dealing with such companies should not be put to trouble to find out who were to be liable as pay-masters. With this view, therefore, the act lays down an arbitrary rule of liability, and says that those shall be liable to creditors of the company who were members at the time of the contract, or at the time the goods were sold, or the judgment recovered, although they had nothing to do with the contract or the goods. It is an entirely arbitrary rule, framed, I apprehend, with a totally different intent to that of regulating the rights of members as between themselves; it had in view one object and one object only, namely, to facilitate the remedies of creditors. At the same time, however, it had the effect of making persons liable for debts to which they would not be liable on the ordinary principles of law, and of fixing on them debts for which they had received no benefit;—as, for instance, if a man held shares when a contract was made, and afterwards sold them: in such case, if an action was brought by a creditor, the party was liable under the contract, because he made the *contract. The statute then, in order to avoid leaving a man in total uncertainty for how many years his estate might be liable to the debts of a joint-stock company, provides that all proceedings against him, at the suit of creditors, must be brought within three years, or else, that those who succeed him will be liable, and his estate will be discharged. It appears to me, (said Lord Truro,) that the statute is here dealing with creditors, and creditors only, and creditors stand in a different situation to members of the company. Suppose there were a number of debts owing, having been owing, probably, for a considerable time, and then, by reason of some circumstance or other, a great loss arises to the company, not on transactions commenced within a recent period, but on transactions commenced long ago, it might operate very injuriously and unjustly to say that, as between the partners themselves, the partnership should not be so wound up as to ascertain what was the state of loss and profit, except for the period of three years from the retirement of each member, and that those who had gone out should not, after that time, be liable to *their partners*, because they had got rid of their liability to

(f) See per *Ld. Cottenham, C.*, in *Ex parte Earl of Mansfield*, 2 Mac. & G. 671.

(g) 7 Geo. IV. c. 46, s. 13; see *Ex parte Gouthwaite*, 3 Mac. & G. 201.

creditors. Also, in taking an account of liabilities as between the partners themselves, independently of the statute, it may be that the partner, who comes in after the debt has been contracted, or who has gone out before the goods have been received, is not liable; in all these cases, reference must be had to the form of the partnership."

It was on these grounds Lord Truro's opinion rested, that the Banking Act had not the effect of varying the liability to contribution between the partners themselves.^(h)

Hence, notwithstanding that statute, a party may be called on as a contributory, or a deceased partner's estate may be made liable to contribute, although he or it be not called upon until three years have elapsed from the cessation of membership in either case.^(h)

[*563] *We shall now advert to various examples of decisions relative to the subject of contributories.

By the deed of settlement of the North of England Banking Company, it was provided that, whenever, by any means whatsoever, any shares should become actually forfeited, or should be duly and effectually transferred to a new holder, then, and in such case, and not before, the responsibility of the previous holder, as a member of the company, in respect of such shares, should, so far as the law would in that behalf allow, cease and determine, &c., &c.

On the 2nd January, 1847, A., being a member and owner of eighteen shares, effectually transfers them to B., and thenceforth A.'s name is not returned to the stamp office as a member. On the 6th March, the company ceased to carry on the business of banking, or any further business than was necessary for the dissolution of the company and the winding up of its affairs.⁽ⁱ⁾ On the 17th November, 1848, the Court of Chancery ordered "that the company be absolutely dissolved, and as from that day, and be absolutely wound up" under "The Winding-up Act, 1848."

It was held, by the Lord Chancellor, on appeal, that A. might be liable (whether or not in equal degree with the existing shareholders at the time of the stoppage is a matter for subsequent inquiry—a matter of fact) to the debts of the company, and, therefore, was properly placed on the list of contributories.^(k)

By the same deed of settlement personal representatives of deceased shareholders might become shareholders, on giving certain notices. A shareholder dies, making T. his executrix. T. never gave the prescribed notices, nor ever received any dividends in respect of testator's shares, but always repudiated the profits, liabilities, and engagements, [*564] *of the company. It further appeared, from T.'s affidavit, that the testator's personal estate did not amount to 20*l.*, and had been altogether exhausted in the payment of his debts; nevertheless, on winding up the company, T.'s name, as *executrix*, was held to have been properly placed on the list of contributories.^(l)

(h) Ex parte Gouthwaite, 3 Mac. & G. 201-203.

(i) 1 De G. & S. 545, 546.

(k) In re North of England Banking Company, (Hawthorne's case,) 1 Mac. & G. 53. Percentage, 20 L. J., Chanc. 462.

(l) Thomas's case, 1 De G. & S. 579.

The same was held to be the case where a shareholder had taken all the proper steps to assign, in conformity with the deed of settlement, to the directors, for more than two months, and until the bank stopped, but the directors omitted, during all that time, to assent to, or dissent from, the proposal.^(m)

B. was one of the projectors of a bank, and concurred in issuing a prospectus, containing regulations, one of which was, that a deed of settlement should be prepared. Several meetings of the proposed directors, at which B. took the chair, occurred, and the terms of the deed of settlement were discussed, but, before it was executed by any one, B. retired, and ceased to be a member of the body. The deed was afterwards executed, at various times, by other members, and contained a clause, whereby the parties ratified all acts, contracts, deeds, matters and things, up to the time of its execution, done, executed and performed by the directors. After the execution of the deed, the dissolution of partnership, between B. and the company, was advertized. Several years afterwards the company was wound up, when it was decided that B. was not properly included in the list of contributories.⁽ⁿ⁾

It is not to be overlooked, however, that a man may be liable to the creditors of the company, who is not liable *inter socios*; ^(o) it seems that the former is not, of itself, sufficient to make a person a contributory under the Winding-up Act, *1848,^(p) but, if not liable as a member, it must be shown, in order to make him a “contri- [*565] butory,” that the party is otherwise liable to the losses and demands of the company.^(q)

The term “contributory” is thus defined by that act:—“The word ‘contributory’ shall include every member of a company; *and* also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof, whether as heir, devisee, executor, or administrator, of a deceased member, *or* as a former member of the same, *or* as heir, devisee, executor, or administrator, of a former member of the same, deceased, *or* otherwise, howsoever.”^(r)

Now, in deciding whether a party is, or is not, a “contributory,” the point to be ascertained is, whether he is liable, in any manner whatsoever, to contribute to the debts, liabilities, and losses, of the company, and it is not necessary that he should be a member of the company according to the strict provisions of the deed of settlement.^(s)

By the same deed of settlement certain formalities were prescribed, by which, on a transfer of shares, the transferee was to become a member of the company; A. became the owner of shares, by transfer, and treated himself, and was treated by the directors, as a shareholder; all the formalities of the deed were not, however, observed in the transaction; A. having died, his executors, *every matter of substance having been com-*

(m) Chartres's case, 1 De G. & S. 581. (n) Busk's case, 3 De G. & S. 267.

(o) Fenwick's case, 1 De G. & S. 560.

(p) Angas's case, 1 De G. & S. 560; Straffon's case, 1 De G., M. & G. 587, 588.

(q) See 1 De G., M. & G. 589.

(r) 11 & 12 Vict. c. 45, s. 3.

(s) Straffon's Executor's case, cor. Ld. St. Leonards, C., 1 De G., M. & G. 576.

plied with, were held to be properly liable, as *contributories*, in respect of such shares, on the winding up of the affairs of the company.^(t)

It is manifest, therefore, and most deserving of attention, that, in [*566] order to make a person liable as a contributory, he *need not be a strictly legal member of the company, according to the strict legal construction of the deed of settlement.^(t)

Thus, where shares were purchased for an infant, without disclosing his infancy, the vendor signing a certificate, required by the company's rules, that the purchaser was of age; it was discovered that the boy was under age; the father entered into a deed, with the company, covenanting to indemnify them from all losses which might be sustained by reason of his son having become a member during his infancy; the father was held liable as a contributory, though he was in no sense a member of the company.^(u)

The term "contributory" has been explained by the House of Lords, in accordance with the opinion of the learned judges, who were summoned to assist them, to be this:—"Contributories are those only who have contracted by themselves or agents with a creditor, or who have agreed to indemnify, or repay in part, or in all, those who have contracted with the creditor, on their own account."^(x)

This seems to be agreeable to what was said by Lord Cottenham, to be the duty of the court in deciding, whether a person was liable, as a contributory. "What I have to do is, in effect, to decide, whether there is anything to make him legally liable to the creditors of the concern;"^(y) and, therefore, it seems, that the principle laid down, in various cases, by another learned judge in equity,^(z) "That the liability of a contributory is not the same thing as the liability to creditors," must be considered as being overruled, unless it can be understood, as meaning, that the two liabilities are not precisely the same, in duration, inasmuch, as a former member cannot be liable to a creditor of the com- [*567] pany, for *more than three years, after he has ceased to be a member, whereas, he may be liable, to some extent or other, to be determined by reference to the facts in each case, to contribute his aid to enable the members of the company, at its winding up, to provide for the losses, &c. beyond that period.

In a banking company, A. was holder of eighty shares, at his death, in 1842; A.'s executrix produced the probate of his will; and for more than three years received the dividends, giving receipts for the same, as executrix, except the first, which was signed in her own name, without addition.

By the deed of settlement,^(a) it was provided, that until certain acts

(t) In *re North of England Banking Company*, (*Straffon's Executors' case*), 1 De G., M. & G. 576, 587.

(u) *Reaveley's case*, 1 De G. & S. 550, affirmed per Ld. Chancellor.

(x) *Bright v. Hutton*, 3 H. Lds. 341, following Ld. Cranworth, V. C., in *Carrick's case*, 1 Sim. N. S. 509.

(y) *Ex parte Hall*, 1 Mac. & G. 315; see 11 & 12 Vict. c. 45, s. 3.

(z) See *Sanderson's case*, 3 De G. & S. 78; *Dodgson's case*, 3 De G. & S. 90.

(a) See clauses set out, In *re North of England Banking Company*, 3 Mac. & G. 190, et seq.

were done, constituting the executor of a deceased member, or the purchaser of such member's shares, a partner in the company, the estate of the deceased member should remain liable.

The company returned the shares in the register list, as shares held by A.'s executrix. There was nothing further to show she had constituted herself a member. The ground on which it was sought here to make the executrix liable, as contributory, was furnished by the provisions of the deed, one of which made each shareholder liable, to the losses of the company, in proportion to his shares; the other amounted to a covenant, (it was contended,) by the shareholder executing the deed, that his executor should remain liable, while the shares continued part of his estate, and Lord Truro held, accordingly, that the executrix was liable, though by reason of her not having observed the requirements of the deed, she was liable, not as a member, but in her representative character.^(b)

A widow, who was entitled, as executrix and residuary legatee of her deceased husband, to shares in a banking company, executed a deed, which professed to assign, but she *did not actually transfer them, [*568] to a trustee, previously to her marrying again. The trustee omitted to comply with the deed of settlement, in respect of the forms, &c., to be observed by an assignee of shares, but he received the dividends, sometimes signing the receipts "for the executors," sometimes, "by procuration" of the testator; once, "trustee" of the widow,^(c) by her widow's name, by which she continued to be called, in the company's books, (where the shares stood in her name, as widow,) and in the registry and returns.

This was held, in one Court of Equity, to be one of the cases in which the formalities required by the deed of settlement had been waived on both sides, and the trustee was considered to be liable to have his name placed on the list of contributories, the liability not to go further back than the date of the deed of assignment.^(d)

Lord Cottenham, however, reversed this decision, on appeal, refusing to hold the trustee liable, as a contributory, without more evidence than the above facts, to show that he had in any way connected himself with the company.^(e)

In the same company, B., in December, 1843, purchased twenty shares, the vendor and he executing the usual deed of transfer, by which B. covenanted with two of the directors of the company, to pay all sums *then* due, or thereafter to become due, on the shares, and otherwise to perform the covenants and conditions of the deed of settlement; B.'s name was thereupon entered in the company's share register book, as owner of twenty shares. In the same month, B. purchased thirty other shares of the executors of a deceased member; no deed of transfer was

^(b) 3 Mac. & G. 199, Gouthwaite's case; see *Ex parte Blakeley's Executors*, *id.* 727.

^(c) See 1 Mac. & G. 316.

^(d) In *re North of England Banking Company*, (Hall's case,) 3 De G. & S. 84.

^(e) *Ex parte Hall*, 1 Mac. & G. 307. Leave was given to take proceedings at law to ascertain Hall's liability to the debts and obligations of the company, but nothing appears to have been done in it.

executed for these shares; but according to the practice, (as stated in the former cases, (f)) they were at once transferred into B.'s name, and to [*569] his account in the share register book. 12th January, 1844, B. wrote to the manager, and inquired as to the circumstances of the company. In reply, the manager communicated certain particulars, and, *inter alia*, stated, "the dividends are now payable, half-yearly, and you will be entitled to one for the last half-year, which will probably be paid in March." (g)

B. subsequently purchased fifty other shares. These shares he, in fact, but without his knowledge, purchased from the directors, being forfeited shares. No deed of transfer was executed in respect of them; and, according to the practice of the company, they were at once transferred into B.'s name, and to his account; and the manager sent him a certificate, that he was owner of 100 shares.

Upon these 100 shares B. continued to receive dividends, until March, 1847, when the company stopped payment. (g)

All the capital of the company appeared to have been lost long prior to 1843. In January, 1844, the liabilities appeared to have exceeded the assets, by a very large sum: also the whole or greater part of the losses of the company had been incurred prior to B.'s becoming a proprietor in it.

The deed of settlement gave power to the directors to sell shares; (h) it only prescribed that a transferee should execute a deed, *if required by the directors*, and it appeared that these directors never so required B. to execute.

As to the twenty shares, all the formalities were observed; about them there was, therefore, no question.

As to the fifty shares purchased from the directors, B. was held to have taken the company, at that time, for better or worse, and put himself in the same position as any other shareholder; and it was said to be impossible to suppose that every different purchaser of shares from the [*570] directors, enters into a separate and distinct contract with the directors, having regard to the liabilities, and the state of the concern at the time.

As to the thirty shares, the formality of a deed of transfer had been waived, in like cases, both by vendors and the directors: and the court thought they were all competent to waive that, (h) and did not consider the circumstance, that there was no deed of transfer, competent—when there was no doubt of the nature of the contract—to vary the liability of the purchaser to the company, or the relation in which he stood to the vendors.

These shares were considered to have been "effectually transferred," within the meaning of the phrase, as used in the deed of settlement, for every purpose.

It is to be observed, that, notwithstanding anything in a deed of set-

(f) *Supra*, pp. 541, 545.

(g) *In re North of England Banking Company*, (Bernard's case,) 5 De G. & S. 283.

(h) 5 De G. & S. 287, 288.

tlement, the liability of the transferor of shares remains, and must remain at law in favour of creditors of the company, just where it was before the transfer; that is, whatever liability had attached during his ownership of the shares continues after the transfer.(i)

In the same company, A. buys through a broker one hundred shares in one parcel, and pays the purchase-money, 300*l.*, to him; the shares belonged to B. and C., each owning fifty of them. A. was accepted as transferee by the directors, and his name duly entered in the company's books, as proprietor of one hundred shares: and he received certificates to the same effect; B., by deed, dated 19th December, 1846, duly transferred to A. five shares; no transfer of the other ninety-five shares was ever executed; the company stopped payment 6th March, 1847, before A. had executed the deed of settlement, and before he had received any dividend. Then the directors made a call of 5*l.* a share, upon which A. pays 500*l.*; 30th November, 1848, the master charged *with the winding up of the company, made a call of 30*l.* a share, under [*571] which A. paid a further sum of 2,500*l.*, in respect of his shares, being allowed, as part thereof, the former sum of 500*l.* paid to the directors' call; 30th June, 1849, A. received notice of a further call by the master, of 20*l.* per share.

It must be observed, that, in the deed of transfer of the five shares, A. had covenanted with the vendor, and also with the public officer of the company, to pay all instalments and sums of money then due, or thereafter to become due, in respect of the five shares.

This covenant, it was held, must govern the whole; the one hundred shares forming the subject of a single contract. Then the covenant operated to throw the entire liability, both past and present, from the vendor upon the purchaser, and the purchaser, therefore, was liable, as a contributory, for the one hundred shares, to the full extent of the covenant.(k)

A person who has entered into a contract for the purchase of shares from a company, which has been approved by the company, and of which a specific performance could have been enforced against him, will be liable, as a contributory, although no complete or formal transfer of the shares, according to the deed of settlement, have been made before the company stopped payment. The price of the shares, it is to be observed, had been paid to the company 28th January, 1847; the company stopped 8th March, 1847.

The time when, for the purpose of being placed on the list of contributories, in cases of winding up the affairs of the company under the Winding-up Acts, a person becomes a member, is the time when he entered on a binding contract to take shares.(l)

(i) Bernard's case, 5 De G. & S. 289.

(k) In re North of England Banking Company, (Dodgson's case,) 3 De G. & S. 85.

(l) In re North of England Banking Company, (Sanderson's case,) 3 De G. & S. 66; see Dodgson's case, 3 De G. & S. 90, remarks on this case. Name of husband to be on list of contributories, he having received dividends on her shares, signing the warrants per proc. of his wife, Burlinson's case, id. 18; see Dodgson's case, id. 90.

[*572] *The statute of 7 Geo. IV. c. 46, as has been observed, does not directly affect the question which arises in such a case; that statute deals with the liability to creditors, and sect. 13, makes the existing shareholders primarily liable; but inasmuch as the question which arises in such a case really is only what is the liability between the members themselves, the statute of itself has no bearing on the question, whether a person is liable to be contributory in respect of liabilities incurred before he became a member.^(l)

The same deed of settlement forbid any share being transferred, on which a call was due and unpaid, and declared void all transfers made contrary to the deed. A legatee of shares, on which a call was due, took a transfer of them from the executors by a deed, to which an officer of the company was party: the legatee applied for the dividends, but was refused, until the call was paid up; this was never done; the legatee afterwards married, neither she nor her husband, either paying or receiving anything in respect of the shares. Nine years afterwards the husband was held liable as a contributory, and it was referred to the master to find whether the wife's name also should not be placed on the list.^(m)

The same deed of settlement provided, that the half-yearly balance sheets of the company's accounts should, as between the shareholders, be binding and conclusive, unless some error shall be discovered therein; it also declared, that a transfer of shares should not release the transferor from liability in respect of his proportion of antecedent losses. A. transfers shares; neither in the preceding nor following half-yearly balance sheet is there shown any loss to have been sustained by the company. The deed provided, that the directors at every half-yearly general meeting of the company should exhibit to the shareholders a balance sheet, &c., and "such a statement of the probable amount of losses to [*573] be apprehended from the subsisting accounts and *engagements of, or with the company, and generally of the state and progress of affairs up to the 30th June and 31st December preceding, as the directors shall deem expedient, for the interests of the company, to be made public." The cashier, who prepared the two balance sheets referred to, proved that the bank had sustained enormous losses at the time they were prepared, and that the representations upon them were in substance incorrect.

It was held, in equity, to be impossible to consider A. to be liable as a contributory, upon the winding up of the company's affairs, without contradicting the clause in the deed, making the balance sheets conclusive on the shareholders.⁽ⁿ⁾

By the same deed of settlement, it was provided: "In case any person, in whom any shares shall, by original subscription, purchase, marriage, bequest, representation, or other mode of acquisition, become vested, and who shall not have executed the deed of settlement, shall, for six calendar months after notice in writing, for that purpose, neglect,

(l) See note (l), preceding page.

(m) Sadler's case, 3 De G. & S. 36.

(n) In re North of England Banking Company, (Holmes's case,) 4 De G. & S. 312. Ne exeat Regno against contributory, (Mawer's case,) id. 349.

or refuse to execute the same, it shall be lawful for the directors to declare the shares so vested in such person, so neglecting, or refusing, and all benefit and advantage whatsoever incident thereto, to be forfeited to the other shareholders, and the same shall be forfeited accordingly."

It had not, however, been the practice of the company, or directors, to enforce the rules, requiring notice to be given by executors, of their intention to become shareholders, the usual course having been for the company to be satisfied with the production, and registration, in their books, of the probate of the will of the deceased shareholder, or letters of administration of his estate, together with such evidence as might be sufficient to satisfy the company of the identity of the person filling the office of executor, or administrator, and thereupon to pay the dividend to him.

*In a case where William Glaholme, a shareholder, died, intestate, and his brother was allowed to receive the dividends, without [*574] administering to his estate, on his signing receipts thus:—"Thomas Glaholme, representative of William Glaholme, deceased," but he never took out letters of administration, the shares were never transferred into his name, nor was his name ever returned to the Stamp Office, as a member; he was held not liable as representative, nor in his own right, to be made a contributory.(o)

Effect of Winding-up Acts.—On the winding up of a trading company, against whom a banking company has a claim, it is not imperative on the Court of Chancery, to decide the legal question of debt, or no debt, in such case; if the circumstances under which the claim is made are such, as to involve points of law, which the court may conceive not to be well settled, the court has a right to have the assistance of a court of law, and may direct a claim, merely to be admitted until the claimants establish their demand at law, for which purpose they will have liberty given them, to take such proceedings at law, as they may be advised;(p) although it was objected, that the trading company, not being one which is authorized to be sued by any officer, could not be sued by the official manager.(q)

The above is stated to show that the truth is, as it seems, the Winding-up Acts are intended for the benefit of contributories, and only secondarily for the benefit of the *creditors*, whose cases are scarcely interfered with by them. It is useful, that, in the process of winding up, the extent of the claims may be known, that something may be had to regulate the making of calls, in order to discharge the liabilities of the company; but the Winding-up Acts do not intend otherwise to interfere with the creditor.(r) Indeed, the statute is [*575] cautiously and studiously framed, so as not to vary, or affect the rights of creditors.(s)

(o) In re North of England Banking Company, (Glaholme's case,) 1 De G. & S. 583, affirmed 1 Hall & T. 123.

(p) In re Norwich Yarn Company, (The East of England Banking Company's case,) 5 De G., M. & G. 505.

(q) See 11 C. B. 498; 3 De G., M. & G. 146; 11 & 12 Vict. c. 45, ss. 50, 90.

(r) S. C., 21 L. J., Chanc. 823, n.

(s) 11 C. B. 516.

Liabilities of Shareholders after Dissolution.—With respect to the liabilities of the partners, or shareholders, after the dissolution of a banking copartnership, it is necessary to enter more fully into explanation, than has hitherto been done; the notices of such questions having only occurred incidentally to the discussion of other principal matters.

When a banking copartnership stops payment, and dissolves itself, the question arises, what is the course for a customer to take whose account, at the time of dissolution, showed a balance in his favour, in order to recover the debt due by the copartnership? One answer is, he may sue, and recover the whole from any one of the late partners, subject to a plea in abatement.

The following instances show the extreme difficulty that lies in the way of a *late* partner, in such case, as regards making out his defence, and protecting himself:—

An action is brought to recover the balances due on the deposit account of the plaintiff, with the Isle of Man Bank, of which the defendant *had* been one of the shareholders. The defendant pleads that the promise, &c., was made by him, jointly with several other persons named in the plea. The plaintiff denies that it was made as alleged. On this issue is joined; and the parties go to trial, where it is proved that there are other persons, who were partners in the bank, at the time of the dissolution, (up to which time the plaintiff had kept an account with the bank,) besides those named in the plea. The plea was, therefore, held [*576] to be disproved, and the plaintiff having proved a balance *of upwards of 676*l.*, had a verdict for the whole amount, which the Court of Exchequer afterwards upheld.^(t)

Now it is to be remarked, that the difficulty of obtaining a correct account of the persons who were partners at any given time must almost always be great, in the case of a party not being a director; for the return to the Inland Revenue Office being only periodical, is not good proof, because numbers of persons may have become partners, and the reverse, since it was last made up.

But this is not all, for the only direct evidence to identify the defendant as a partner, was proof that a person of the same name had subscribed the deed of settlement; this fact, taken in addition to the plea, and the course taken on the proceedings at the trial, were held to constitute sufficient evidence to go to the jury, that he was a partner.

In another case, the same plaintiff brought an action against another alleged partner in the same bank; a similar plea was pleaded with the same results; but the account, in this case, was kept at a branch bank, established at Castletown. The deed of settlement provided for the establishment of branches within the Isle of Man, if agreed to by the unanimous vote of the directors, at a meeting convened in a manner prescribed. There was no evidence that the Castletown branch had been established with the prescribed formalities; but it was shown, that it had been carrying on business for three years previous to the cause of action

(t) *Crellin v. Calvert*, 14 M. & W. 11; Rolfe, B., dissentiente, Pollock, C. B. and Platt, B., deciding as above.

arising, during all which time the defendant had been a partner of the bank, and had received dividends, and had never made any objection to the establishment of this branch. On the other hand, there was no direct evidence that he knew of the establishment of it, and it seemed that he resided at Huddersfield.

But the court held, the mere lapse of time to be evidence [*577] *against the defendant either that the Castletown Branch was established in pursuance of the requirements of the deed of settlement, or that, if it was not, he knew and assented to its establishment otherwise, so as to be liable to the plaintiff, as a depositor in that branch,^(u) and the plaintiff recovered in that action also.

Now, these decisions are the more deserving of notice, because they define strictly the responsibility, after dissolution of the company, which falls upon the *quondam* members of the company; and because, on the other hand, it is observable what difficulties, in most cases, lie in the way of retirement, or withdrawal, of a member, who becomes dissatisfied with the management or the prospects of the business; if the affairs of the company are in a languishing state, it might be very doubtful whether the sale, by a member to the directors, of his shares, would be held to be valid, assuming he had knowledge of the condition of the company's affairs; if he seeks to withdraw himself, by compulsory means, it is probable he would find that he can only obtain that relief on the ground of fraud, or misrepresentation having induced him to become a member, and then he must not only sue the directors and company, but make all the other shareholders parties to the record.^(x)

Criminal Liability.—Among the liabilities of the members, or shareholders, of these banking copartnerships, is to be mentioned, the liability to criminal proceedings, at the instance of the company, in respect of the partnership property, &c.

Any member of any banking copartnership, of the descriptions now under consideration, who shall steal or embezzle any money, goods, effects bills, notes, securities or other property, of or belonging to any such copartnership, or shall commit any fraud, forgery, crime, or offence, [*578] *against, or with intent to injure or defraud any such copartner-ship, shall be liable to indictment, information, prosecution, or other proceedings, in the name^(y) of any of the officers, for the time being, of any such copartnership, in whose name any action, or suit, might be lawfully brought against any member, for every such fraud, forgery, crime, or offence, and may thereupon be lawfully convicted, as if any such person had not been, or was not, a member of such copartnership.^(z)

^(u) Crellin v. Brook, 14 M. & W. 11.

^(x) Macbride v. Lindsay, 22 L. J., Chanc. 165; Ex parte Bennett, 24 L. J., Chanc. 130.

^(y) See 2 Russ. Cri. & M. 385.

^(z) 3 & 4 Vict. c. 111, s. 2.

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*CHAPTER XVI.

JOINT STOCK BANKS.

SINCE 5th September, 1844, it is not lawful for any company, of more than six persons, to carry on business, as bankers, in England, under any agreement, or covenant, of copartnership, made on or after 6th May, 1844, unless by virtue of letters-patent granted according to the Joint Stock Banks Regulation Act of that year.^(a)

A body of persons, wishing to become a joint stock banking company, are to petition the Queen, in council, according to a prescribed form; ^(b) and, on the report of the board of trade, that the statutory requirements have been complied with, a charter will be granted; ^(c) then a deed of settlement is to be executed, containing certain specified provisions, ^(d) which, however, have been materially altered, in one respect, by subsequent legislation, to be mentioned hereafter, so as to admit of the re-election of outgoing directors, &c., ^(e) and the deed must be executed by the holders of, at least, one-half of the shares, ^(f) and the Queen may, by the letters-patent, incorporate the company; ^(g) but so that the liability of the shareholders shall not be limited, ^(h) and actions may be brought by, or against, the company, or shareholders, reciprocally, ⁽ⁱ⁾ every judgment, &c., against the company, being enforceable against the company, and, *under certain restrictions, against share-
[*580] holders and former shareholders, ^(j) and execution against the company, proving ineffectual, may be had against any shareholder, and, if that be unproductive, then against any person who was a shareholder at the time the cause of action arose, with the limitation of three years, &c., ^(k) such shareholder being entitled to reimbursement from the effects of the company, or, in default, to contributions from the other shareholders. ^(l)

Registration within 7 & 8 Vict. c. 110.—That a bank consists of more than six persons, and is a banking company, carrying on business within sixty-five miles of London; ^(m) that the shares are of a less amount than 100*l.*; and that the company carry on the business of bankers otherwise than by letters-patent granted according to stat. 7 & 8 Vict. c. 113, is not a good ground to allege why a company is not entitled to registration within 7 & 8 Vict. c. 110, if the deed of settlement does not disclose that the company is to be a banking company; for a company, under 7 & 8 Vict. c. 110, s. 25, when completely regis-

(a) 7 & 8 Vict. c. 113, s. 1.

(c) *Id.*, s. 3.

(e) See *infra*, p. 592.

(g) *Id.*, s. 7.

(i) 7 & 8 Vict. c. 113, s. 9.

(k) *Id.*, s. 10, see *supra*, pp. 481, 482.

(m) *Reg. v. Whitmarsh*, 15 Q. B. 600; see 7 & 8 Vict. c. 113, s. 47; see *O'Connor v. Bradshaw*, 5 Exch. 882. The new Joint Stock Companies Regulation Act, 19 & 20 Vict. c. 47, does not apply to banking companies, see s. 2.

(b) *Id.*, s. 2.

(d) *Id.*, s. 4.

(f) 7 & 8 Vict. c. 113, s. 6.

(h) *Id.*, s. 8.

(l) *Id.*, ss. 11, 12, 13, 14, 15.

tered, are only authorized to carry on *the* trade, or business, which is according to the provisions of their deed, the registration not legalizing the carrying on any business not stated in the deed.*(m)*

It is still necessary, that a body of persons, intended to form a joint stock banking company, should be provisionally registered; for it was clear that, previously to the late act, all joint stock companies must be provisionally registered,*(n)* and that act does not apply to banks.

** Offices.*—Such a bank, incorporated, may, nevertheless, hold land for the purpose of offices, &c., without being within the [*581] Mortmain Act.*(o)* It is to be observed, that the letters-patent incorporate the body for the purposes of banking, and empower them to purchase and hold lands to such value as shall be expressed in the letters-patent; but these are granted for a term of years, not exceeding twenty years.*(p)*

Returns.—Within three months after the grant of the charter, and before the company shall begin business, a memorial is to be made out,*(q)* setting forth the title of the company, the names and places of abode of all the members, and of every director and manager, or other like officer, and the name or form of every bank established by the company, and the name of every town or place, where the business shall be carried on: this is to be repeated every year between 28th February and 25th March, as long as they carry on business as bankers, to be delivered to the Inland Revenue Office, there to be filed, and an entry or register of it made in a book, to be open to search, for a fee of one shilling; and a printed list of the registered names and places of abode is to be made out, from time to time, and kept in a conspicuous place, in the company's principal place of business;*(r)* a like memorial shall be made out, from time to time, as occasion shall require, and delivered to the above board, according to a prescribed form,*(s)* containing the above particulars, of every new director, manager, or other like officer, and the names of all persons who have become members, either in addition to, or instead of, any former member, and the name of every new town, in which [*582] *the company carry on business, and the names of all who have ceased to be members; and such further account is to be filed, &c., &c., as above;*(t)* all these memorials to be signed by the manager, or one of the directors, and verified by his declaration before a magistrate, &c.,*(u)* and the persons whose names appear in the then last-delivered memorial shall be, from time to time, the existing shareholders.*(x)*

The courts, it appears, will not interfere with the company, in their

(m) See note *(m)*, preceding page.

(n) *Abbott v. Rogers*, 24 L. J., C. B. 158.

(o) *Ware v. Cumberlege*, 24 L. J., Chanc. 631.

(p) 7 & 8 Vict. 113, s. 6. As to lease of house in London, and as to tithes, rent, &c., *Vivian v. Cochrane*, 25 L. J., Chanc. 553.

(q) See 7 & 8 Vict. c. 113, Sched. A.

(r) See id. s. 16.

(s) See id., Sched. B.

(t) See 7 & 8 Vict. c. 113, s. 17.

(u) See id., s. 18. What evidence of memorials, id., s. 19; *Prescott v. Buffery*, 1 C. B. 41. Certified copies, id., s. 20.

(x) See id., s. 21.

performance of the duty of making these returns, as regards the form in which they are made, so as to prescribe how they are to be made, or restrain from making in a particular way. The following example has occurred:—

A., being a shareholder, in a joint stock bank, executed a deed of transfer of his shares to his sister, and received from the company certificates of the shares in her name. *Previously to the execution of the transfer*, and in consequence of communications with A., the company had, in their returns under 7 & 8 Vict. c. 113, omitted A.'s name, and returned that of his sister as a new member of the company. The bank stopped payment; and a call was made of 5*l.* per share, which the sister declared her inability to pay. After this the company returned A.'s name to the Inland Revenue as the shareholder, and, subsequently, informed his sister, that the company could not recognize the transfer to her.

On these facts a court of equity refused, in an interlocutory application, to restrain, by injunction, the company from returning A.'s name as a member; partly, because, assuming A. to be right, there was no ground to think that, as between A. and the company, any irremediable or serious mischief would be done by the performance, by the company, of the acts which it was sought to restrain; partly, because, on the same [*583] assumption, none of those acts, if *done, would be conclusively binding, as between A. and a stranger, and partly, because the court thought it not clear that A. was right, and chiefly, because the application in effect was, for the court to issue a direction, that a return on oath shall be made in a particular form—an insurmountable difficulty.^(y)

Besides the above returns, which it will be seen are not enforced by a penalty, but which the company ought not to omit to make, with all the proper forms, inasmuch, as for such nonfeasance, the company might be indicted as for a misdemeanour:—there are those required by stat. 7 & 8 Vict. c. 32, s. 21,^(z) to be made by every banker in England on the 1st January, or within fifteen days after, in each year, under a penalty of 50*l.* These, also, these companies must make.

Change of Firm.—The law, as before stated,^(a) on this subject, is applicable, as regards firms of customers of the bank, to joint stock banking companies, equally with private banks and banking copartnerships: an instance of a nature not unlikely to occur in practice may be stated here, as a guide, in respect to one of the most material questions that can arise out of the subject, of the relations between a firm customer, and a joint stock banking company, when one of the directors of the company is a partner in the firm.

A partnership, consisting of four persons, carry on business under the firm of A. B., & Co., and open an account with a banking company; then, one of the four partners retires from the business, but this is not advertized in the London Gazette, nor is the pass-book altered, although

^(y) *Bullock v. Chapman*, 2 De G. & S. 211, 214.

^(z) See the sect. *supra*, p. 444.

^(a) See *supra*, pp. 304, 305.

the style of the firm is altered on their sign-board, cards, and invoices, and a cheque drawn in the style of the old firm was presented, and paid by the bank, after the change. B. *is also a director of the bank, but without any share in the management of the concern, [*584] and not interfering with the accounts, though attending the weekly meetings of the directors; he never mentioned the fact of the change to any of them.

This circumstance was determined not to operate as notice to the company, of the dissolution of the partnership, so as to exonerate the retired member of the partnership from a debt incurred by the partnership with the company, subsequently to his retirement; (b) because B. could not be regarded as agent of the company, so that notice to him was notice to the principal.

On the other hand, however, notice to the head office of a joint stock bank will almost certainly be held to be notice to its branches; at all events, from the time when the information of the fact could be transmitted to them, (c) because that is a case of principal and agent, and it is the duty of the principal to communicate notices, &c., to the agent.

Capital.—The capital stock of a joint stock banking company, under this statute, is in no case to be less than 100,000*l.*; the actual amount which the company propose to go on with; the means by which it is to be raised; the amount of it paid up at the date of the petition to the queen, in council, for the grant of letters-patent; where and how such paid-up capital is, at that date, invested; must all be set out in such petition. (d)

It might seem to be too obvious, to require statement, that customers of banking, as of all other joint stock concerns, are, in the highest degree, interested to be precisely informed *of, and to ascertain exactly, the amount of the capital with which the company is [*585] carrying on, or proposes to carry on, its concerns; but the frequency of misapprehensions on this subject, and on the resulting question of the extent of the liability of directors, shows that it will be desirable to call the attention of all who deal with banks, of this nature, very particularly, to the importance of due inquiries, and full satisfaction respecting it.

Generally, the known principle of equity is:—if a person, or a body of persons, induce another to enter into a contract, on the faith of representations of facts, which are incorrect, that person, or body of persons, is bound to make good those representations.

When, however, the directors of an association, for the purpose of banking, represent the capital of the concern to be a certain amount—say, 100,000*l.*, divided into so many shares, each of such and such amount, all that they must be understood to intend, according to the known usage in such matters, is to state their meaning, (if they get sub-

(b) *Powles v. Page*, 3 C. B. 16, and cases cited there; the case itself related to a banking copartnership under 7 Geo. IV. c. 46, the principle of it applies equally to joint stock banking companies.

(c) See principle laid down in *Willis v. Bank of England*, 4 A. & E. 21.

(d) 7 & 8 Vict. c. 113, s. 2.

scribers enough,) to work the undertaking with that capital. Without something more than the usual statements on such occasions, this does not amount to a representation, that the whole of this capital has been paid up, and is in the coffers, or at the command, of the company, to conduct their business with, so as to enable the customers to say, "inasmuch as you represented the capital to be 100,000*l.*, you, the directors, are liable, and each of you is liable, to make good to us the whole amount of that sum."

Nor will directors be held liable in equity, although there may be the additional circumstance of a clause in the deed of settlement, providing that each shareholder was only to be liable to the extent of his contribution to the capital of 100,000*l.*, by which, it might be considered, the directors meant to represent, or did represent, there to be 100,000*l.*, worth of shares actually paid up.^(e)

[*586] **Shares.*—In the petition to the queen, in council, for the grant of letters-patent, the persons proposing to become a joint stock banking company, under this statute, must set out the proposed number of shares in the business; the shares are not to be less than 100*l.* each; the actual amount of each of the shares into which the proposed capital stock is to be divided must also be stated.^(f)

Every deed of partnership of a joint stock company, under this statute, must contain specific provisions for preventing the company from purchasing any shares, or making advances of money, or securities for money, to any person, on the security of a share, or shares, in the partnership business.^(g)

Buying up Shares.—There have been cases in which *directors* have bought up shares, in the company, with money taken from the funds of the company. Now, when there is no authority given, in the deed of settlement, empowering them to do this, they are held liable *in equity*.^(h) to this extent; viz., they must not only refund the sums which they have applied, out of the company's funds, in these purchases, but they must stand in the shoes of the persons whose shares they have so bought up, and incur their liability to the company, that is, they must pay up the unpaid residues of the prices of the shares due on the shares respectively, which those persons would have been liable to pay up, had they remained shareholders; for the directors cannot be permitted to relieve any one from liability, to pay up the residue of his contributions to the capital which was to be charged with the debts due to the customers.⁽ⁱ⁾

On the whole, it appears settled, that, in ordinary cases, and without some special authority in the deed of settlement, (if even then,) directors cannot enable shareholders to withdraw **from the concern*; this [*587] is *ultra vires* of directors as such.⁽ⁱ⁾

Liability of Solicitor.—As regards the above, and other incidents of a director's responsibility, it is material to observe, that it is not only persons who are regularly and formally directors who may incur it; others

(e) *Evans v. Coventry*, 25 L. J., Chanc. 499, 500.

(f) 7 & 8 Vict. c. 113, s. 2.

(g) *Id.*, s. 4.

(h) *Evans v. Coventry*, 25 L. J., Chanc. 501; see *supra*, p. 547.

(i) *Ex parte Bennett*, 24 L. J., Chanc. 130; see 6 Moo. P. C. 171.

may so act as to bring themselves within it; thus, a solicitor of a company, who is in the habit of attending directorial meetings, receiving the allowances, paid for their attendances, to directors, taking the chair, which none but directors were authorized to do, has been held to have acted so as to render himself responsible as a director, during the time of his attendances.^(k)

Transfer of Shares.—Subject to the regulations of the Joint Stock Banks Regulation Act, and to the provisions of the deed of settlement, every shareholder may sell and transfer his shares by deed duly stamped, in which the consideration shall be truly stated, such deed to be according to a given form,^(l) or to the like effect; such deed, after execution, to be delivered to the secretary of the company, to be kept by him, and a memorial thereof entered by him in the register of transfers; then the entry is to be indorsed on the deed, at a fee for every such entry and indorsement, of not exceeding 2s. 6d., payable to the company.

Until such transfer have been delivered, as above, to the secretary, the buyer is not entitled to dividends, or to vote, in respect of such share.^(m)

No share can be transferred until all calls, for the time being due on it, and every other share the owner of it holds, shall have been paid.⁽ⁿ⁾

*The register of transfers may be closed by the directors, for not more than fourteen days, previously to each ordinary meeting; they may fix a day, for the closing, of which seven days' notice is to be given in a newspaper, (it seems the London Gazette is intended; ^(o)) any transfer made within such fourteen days shall be considered as being made subsequently to such ordinary meeting, as between the bank and the transferee.^(p) [*588]

When shares have come to any one by the death, bankruptcy, or insolvency of a shareholder, or by the marriage of a female shareholder, or by other legal means than by the above mode of transfer, the claimant shall not receive dividends, or vote in respect of them, until his acquirement of them have been authenticated by a declaration in writing, stating the manner, how, and to whom they have passed, to be made and signed by some credible person before a magistrate, &c.^(q)

This declaration is to be left with the secretary, who thereupon must enter the name of the person entitled, on the register book of shareholders, at a fee of not exceeding 2s. 6d., payable to the company.^(r)

Where persons are jointly entitled to shares, all notices required to be given to shareholders must be given to the person whose name stands

(k) 25 L. J., Chanc. 501.

(l) See 7 & 8 Vict. c. 113, Sched. C.

(m) Id., s. 23.

(n) Id., s. 24.

(o) In the stat. s. 25, the words used are, "notice shall be given by advertisement in some newspaper as after mentioned," but the only newspaper mentioned subsequently is the London Gazette, mentioned in S. 38.

(p) Id., s. 25.

(q) See Id., s. 26. The directors may require such other form as they think fit, s. 26.

(r) See Id. Transmission of shares by will, intestacy, marriage, id., s. 27.

first in the register of shareholders, which is to be notice to all of them.^(s)

When the shareholder is a minor, idiot, or lunatic, the receipt for any money payable to him, of the guardian, in *case of a minor, of [^{*589}] the committee, in case of an idiot or lunatic, shall be sufficient.^(t)

The company are not bound to regard trusts to which any shares may be subject.^(u)

The receipt of the person, in whose name a share stands in the books of the company, discharges the company, in respect of any dividend or other sum, payable in respect of such share, notwithstanding any trust attaching to the share.^(v)

The liability of shareholders is unlimited;^(x) they may be sued by, and may sue, the company,^(y) and judgment, decrees, and orders, against the company, may, in certain circumstances, be enforced against them individually, whether they were members at the time the cause of action arose, or have been members within three years.^(z)

Executors.—As to the liability of executors, in respect of shares of the testator, in a joint stock banking company, it seems desirable to state such principal points as have been decided by the courts.

Anne Hall, being an owner of thirty shares, regularly entered in her name in the books of the company; by her will gives them to her daughter and her son, making the son and a Mr. Crossfield joint executors; the latter never took an active part in the executorship; but he proved the will, and acted as executor, thus becoming, in all respects, liable as executor. An entry of the probate of the will was duly entered in the books of the company, in compliance with the above statute, giving the executors a right to deal with the shares, according to the provisions of the deed constituting the company; the shares were entered in the names of R. Hall, (the son of testatrix,) and J. Crossfield, as ex-
[^{*590}] cutors, &c. No communications ever took place between *the latter and the bank, relative to the shares; Hall received the dividends, and corresponded with the bank on the subject of the shares: Hall sold some of them, and received the dividends of the remainder. More than nine years after the death of Anne Hall, the company failed.

Then the question was, whether Crossfield was liable to the debts of the company, in respect of these shares, and it was held by Lord St. Leonards, C., that he was.^(a) There was in the deed of settlement, in this case, an independent covenant—that is, a covenant by each shareholder—binding their real and personal representatives, that they will continue liable, in respect of any shares, that form part of their assets. The reason for the insertion of such a clause is this—the executors, *quod* executors, not becoming members, and not having sold, would not them-

(s) *Id.*, s. 28.

(t) 7 & 8 Vict c. 113, s. 29.

(x) *Id.*, s. 7.

(z) *Id.*, ss. 9, 10, see *supra*, pp. 482, 483.

(a) Crossfield's case, 2 De G., M. & G. 128.

(u) *Id.*, s. 30.

(v) *Id.*, s. 8.

selves be responsible personally, and until they sold, and other persons came in their place, there would be no *personal* responsibility.

Generally, the rule is, that executors, holding shares merely as such, and *never having taken them to themselves* as beneficial holders of them, are only liable to the extent of the assets of those whom they represent: the liability is that of the estates of the original holders; and so is the practice under the Winding-up Acts, and in a creditor's suit, in the case of a representative of a deceased executor. *(b)*

In the case just referred to, *(c)* it was in vain contended upon the facts, that, as by the deed no executor is entitled to receive the profits of the share of his testator, until he shall have become a member, but those profits shall be kept in suspense, accumulating; to be a great hardship on Mr. Crossfield, that the money is not now in deposit, as it ought to have been, because, if it had been so, it would have gone in a great measure to answer the liability sought to be cast upon him in the suit; and further, that this circumstance shows *Hall to have been accepted as a member, and the company to be bound by the ac- [*591]
ceptance.

In answer to this Lord St. Leonards said, "I have held, and am prepared to hold again, that directors may do acts in reference to the transfer of shares, binding upon the whole body, by which they waive certain formalities which they ought to have observed." *(c)*

In an ordinary trading partnership it is to be remembered, that, in the common law courts, every member is liable to the full extent of his fortune, for the debts of the whole body; and no stipulation in the deed of settlement can alter this liability, *(d)* as to the creditors of the company; their rights remain precisely the same, whether such a stipulation be, or be not, inserted in the deed; such a provision applies only between the shareholders; *(e)* the common law pays no regard to the stipulations, restricting liability, when the interests of third persons intervene. *(f)*

Calls.—From time to time the directors may make such calls on the shareholders, "in respect of the amount of capital stock, respectively subscribed by them," as the directors shall think fit. *(g)*

Whenever execution upon any judgment against the company shall have been taken out against any shareholder, the directors, within twenty-one days next after notice shall have been served upon the company, of the payment of any money by such shareholder, or by his executors, &c., in or toward satisfaction of such judgment, *shall make* such calls upon all the shareholders, as will be sufficient to reimburse such shareholder, &c., and every shareholder must *pay every call, to the persons, at the times and places, from time to time appointed [*592]
by the directors. *(h)*

(b) Evans v. Coventry, 25 L. J., Chanc. 499.

(c) 2 De G., M. & G. 127, 128; see 5 H. Lds. 297, and cases there.

(d) This is not peculiar to the common law of England, see Fox v. Clifton, 6 Bing. 776.

(e) See Hallett v. Dowdall, 18 Q. B. 2, 50; Smith v. Hull Glass Company, 8 C. B. 675; S. C., 11 C. B. 897; and see 25 L. J., Chanc. 492.

(f) See Evans v. Coventry, 25 L. J., Chanc. 497, 498, for observations as to the relief in equity in such case. *(g)* 7 & 8 Vict. c. 113, s. 31.

(h) 7 & 8 Vict. c. 113, s. 31. Interest at 5l. per cent. per annum on calls un-

Besides being liable to pay calls, by way of action, shareholders may forfeit their shares, by leaving calls unpaid, if the directors, at any time after six calendar months from the day appointed for the payment of such calls, declare them to be so forfeited; the shareholders still remaining liable for the calls due before the forfeiture.(i)

But in order to authorize the sale, &c., of such shares, the declaration must be confirmed at some general meeting, held at least two calendar months from the day the notice of intention to declare was given.(k)

And on payment of the arrears of calls; due on such shares, &c., being made before the actual sale of them, they revert to the original owner.(l)

Directors.—The deed of partnership of every joint stock banking company, under this statute, which is to be prepared according to a form, to be approved of by the Board of Trade, in addition to any other provisions which may be contained in it, must contain specific provisions for the management of the affairs of the bank, and the election and qualification of directors.(m)

As regards re-election of retiring directors, no deed of settlement, of any company, established since 29th July, 1856, need contain any proviso for *preventing* the re-election of retiring directors, either absolutely, or for any limited period; and, in every banking company, being at that [593] date *established under 7 & 8 Vict. c. 113, the directors retiring at any general meeting, henceforth will be eligible for re-election, (if duly qualified in other respects,) notwithstanding the proviso of the last-mentioned statute,(m) that the deed of partnership, of every banking company, to be established under that act, should contain a specific proviso, for the retirement of at least one-fourth of the directors, yearly, and for preventing the re-election of the retiring directors, for at least twelve calendar months: this proviso having been lately repealed.(n)

Any one of the directors is empowered to sign bills of exchange, or promissory notes made, accepted, or indorsed, on behalf of the company, provided it be therein expressed to be so made, &c., by him on behalf of the company; and he will not be liable on such bill, &c., otherwise than he would be on any other contract, signed by him, on behalf of the company.(o)

The powers and obligations of directors, as to calls, are stated under that head,(p) and, generally, some observations, applicable here also, will be found above.(q)

paid, s. 32. Action for calls, ss. 33, 34; proof, s. 35. Register book to be proof of proprietorship, s. 36; see *Waterford Railway Company v. Wolseley*, 1 Ir. L. R. (N. S.) 444.

(i) *Id.* s. 37. Notice of the intention to declare must first be served, &c., *id.*, s. 38; if the address is not known, must be published in *London Gazette*, s. 38.

(k) *Id.*, s. 39. Evidence of forfeiture, s. 40. Title to such shares, of buyers, s. 40. Limit on power to sell, s. 41.

(l) *Id.*, s. 42.

(n) 19 & 20 Vict. c. 100, ss. 1, 2.

(p) See p. 591.

(m) 7 & 8 Vict. c. 113, s. 4.

(o) 7 & 8 Vict. c. 113, s. 22.

(q) See *supra*, p. 525.

Generally, what has been said of directors of copartnerships under 7 Geo. IV. c. 46, holds with respect to directors of joint stock banks.

Service of notices, writs, or other proceedings at law, in equity, or otherwise, on any director, for the time being, by leaving the same at the principal office, or if the company have suspended or discontinued business, by serving personally such director, or by leaving with some inmate, at his usual or last abode, is good service on the company.^(r)

In taking securities, other than actual deposits of negotiable securities, goods, &c., as explained above,^(s) directors and *managers have frequently to consider the *validity* of the thing offered, by way [*594] of safeguard from loss; thus, if it be a mortgage of land, it ought to be satisfactorily shown, that there is no prior mortgage, or if there is, that the amount of it is such as to admit, in addition, of the further mortgage proposed: if the land lies in a register county, care ought to be taken to see that the deed is duly registered; if a bill of sale of goods be taken, it must be duly filed;^(t) and then considerations must be gone into, as to the circumstances in which the assignment is made, and if by a trader, whether it is made in such a posture of his affairs as to amount to a delay of creditors,^(u) or to a fraudulent preference;^(x) if a bond—as a post obit bond—is offered, it may be, that if it have been given for a gambling debt, or on some other illegal consideration, to the knowledge of the banking company, or their representative in the transaction, they could not enforce it.^(y)

Dividends.—A very commonly known temptation besets directors of these and other joint stock bodies, to declare and divide dividends to the shareholders without due regard to the actual state of the company's affairs. The deed of settlement mostly provides against this, by enjoining, that no dividend shall be made, except in a prescribed manner, and under specified circumstances. Then, what is the liability of directors who, in disregard of this provision, declare and divide dividends? In the event, (which, in most cases, is almost certain,) that knowledge of the real state of the affairs of the company can be brought home to them, they will be *made in equity to refund, not only the dividends, [*595] on their own shares, which they distributed to themselves, under such declarations, *toties quoties*, but they will also be made to refund *all the dividends*, paid under such declarations of dividend, so far as they were, personally, parties to the declaring of dividends, or concurred in it.

It will not suffice for them to prove, that they did not act under the influence of the desire to pocket the dividends on their own shares, but with a desire of representing the concern to be in a prosperous condition,

(r) 7 & 8 Vict. c. 113, s. 43.

(s) See chapter VI.

(t) 17 & 18 Vict. c. 36.

(u) See *Bittleston v. Cooke*, 25 L. J., Q. B. 281; *Leake v. Young*, id. 266; *Ex parte Taylor*, 5 De G., M. & G. 392; *Ex parte Sparrow*, 2 De G., M. & G. 27; *Ex parte Bland*, cor. Lds. Justices, Nov. 1855. Mortgage of machinery, *Mather v. Fraser*, 2 K. & J. 536; see *Flory v. Denny*, 21 L. J., Exch. 223.

(x) See *supra*, pp. 85-87, 321.

(y) *Hawker v. Hallewell*, 25 L. J., Chanc. 588; as to mortgage of reversionary interest, S. C.

so as to attract an increase of custom, and to raise the value of the shares, and stimulate the demand for them in the market:—it will make no difference, that they insist on it, their real object was, the ultimate interests of the shareholders, and the advantage of all parties:—they will be held liable for the aggregate of the dividends, which have been disbursed under declarations of dividends, to which they were parties, or in which they concurred;(z) for their acts are to be regarded as fraudulent towards any person, who may be induced by this false semblance of prosperity, to place his money with the company; it is not only that such acts are contrary to the regulations of the company, but they constitute breaches of duty as well to the customer as the shareholder.(z)

Manager.—A manager, or other officer to perform the duties of a manager, must be appointed, in all cases of joint stock banking companies, under this statute.(a)

The duties of the manager, who is not personally liable on contracts signed, by him, on behalf of the company, are the following only, as limited by the statute.

Bills of exchange, or promissory notes, made, accepted or indorsed on behalf of the company, may be made, &c., in any manner specified in [*596] the deed of partnership, provided *they be signed by the manager (or one of the directors,) and be, by him, expressed to be so made, &c., by him, on behalf of the company.(b)

Service of notices, writs, or other proceedings at law, or in equity, or otherwise, on the manager, by leaving them at the principal office of the company, or if the company have suspended or discontinued business, by serving personally the manager, or by leaving with some inmate, at the usual or last abode of the manager, is good service on the company.(c)

Meetings.—There must be holden once, at least, every year, at an appointed time and place, an ordinary general meeting of the company.(d)

Extraordinary general meetings must be held upon the requisition of nine shareholders, or more, having, in the whole, at least twenty-one shares.(d)

Audit.—The deed of partnership must contain provisions for the yearly audit of the accounts by two or more auditors chosen at a general meeting of the shareholders, and not being directors.(d)

Publication of Accounts, &c.—The deed of partnership must contain provisions for the publication, once, at least, in every month, of the assets and liabilities, and for the yearly communication to every shareholder of the auditors' report, of a balance sheet, and profit and loss account.(d)

Mutual Duties of Members.—In general, as regards the mode in which joint stock banks will be dealt with by the courts, the law is to be gathered from the principles laid down, by high authority, thus, in speaking of joint stock companies generally.

(z) *Evans v. Coventry*, 25 L. J., Chanc. 500, 501; see *supra*, p. 547.

(a) 7 & 8 Vict. c. 113, s. 4.

(b) 7 & 8 Vict. c. 113, s. 22.

(d) *Id.*, s. 4.

(c) *Id.*, s. 43.

*If a deed of settlement contains provisions, with respect to general and extraordinary meetings, it is especially necessary to hold its members, as strictly as may be, to the very letter of their contracts with each other; for, otherwise, when it is proposed to deal with the affairs of the company, in pursuance of resolutions passed at such general or extraordinary meetings, many of the partners, who may be unable or unwilling to attend, may find themselves bound by proceedings which have taken place at such meetings, though directly opposed to the terms on which they have entered on the partnership.(e) [*597]

A resolution, even of a general meeting, involving a positive breach of the existing rules and regulations of the company, the deed of settlement expressly confining the powers of general meetings to measures not inconsistent with those rules, is clearly beyond the powers of a general meeting, but it may, or may not, be within those of an extraordinary meeting, according to the terms of the deed.(e)

The majority of a joint stock company have no power to divert the funds to other and different purposes from those contemplated in the deed of settlement;(e) for though the majority may bind the minority upon every point which the deed, by their common contract, authorizes, yet they have no authority whatever to bind the minority on any matter that is not within the common contract.(f)

It is of no avail to bind the partnership, that the directors and others present at a meeting, where any course is resolved on beyond the objects contemplated in the deed, bind themselves not to dispute what is there agreed on; that may or may not bind the individuals; it does not bind the company.(f)

Partners may, no doubt, however numerous, as other *people may, depart from the general contract between them, but they cannot depart from it without the consent of every individual member composing the partnership. If what they do is not done within the limits of the contract which they had originally entered into, it is not binding on their co-partners. Nor can it be said that the company are precluded—as was once thought might be alleged with effect—by acquiescence in what has been done; because, properly speaking, the ground is not laid for that argument, unless it be shown that all the members were present at the meeting where the alteration was made, or that all had knowledge, and a perfect understanding, of what was done, and of the effect of it, and assented to and acquiesced in it. But, in truth, practically, the application of the doctrine of acquiescence to such cases must lead to insuperable difficulties, because, in dealing with individual members, some who are asserting equities, which they have precluded themselves from maintaining, may be bound quā partners by particular acts, while the general body would not be bound.(g) [*598]

Advances to Directors, &c.—Experience has shown the besetting

(e) See per *Ld. St. Leonards, C.*, in *Lawes's case*, 1 De G., M. & G. 429-433; per *Ld. Cottenham, C.*, in *Morgan's case*, 1 Mac. & G. 225; per *Ld. Eldon, C.*, in *Const. v. Harris*, Turn. & R. 496.

(f) See 1 Mac. & G. 235, 239.

(g) See *Morgan's case*, 1 Mac. & G. 240; *Lawes's case*, 1 De G., M. & G. 433.

evil of joint stock banking companies to be a too great readiness to make advances, and that, too, without proper security, and in many cases the advances have been made to other joint stock concerns. Now, it is very material, in case of an application for accommodation of this kind, by the directors of a joint stock trading company, to the directors of a bank, for the latter to ascertain whether the former have power to borrow given them by the deed of settlement, and next to see whether theirs is one of the extremely few cases in which the law implies an authority to borrow money from the nature of the dealings and business of the company; unless one or other of these is the case, money advanced by the bank [*599] will not be debt due to the *bank from the trading company, and cannot be recovered as such. (h)

Contracts.—Directors of a joint stock company, incorporated, enter into a contract, under the common seal of the company, exceeding their authority in so doing. This, of itself, does not, it has been said, avoid the contract; it must further be shown, in order to do this, that the contracting parties, when they contracted, were aware of the fact, and aware, also, that the contract would be prejudicial to the interests of the shareholders; and the obligees of the bond, a banking company, recovered upon it. (i)

This decision lays down a principle which it is important for all bankers to be aware of; it is mentioned here, because it is, in cases of joint stock banking companies, that transactions of this kind, viz., loans or advances of money to a corporation, upon its bond, experience shows, most commonly to occur.

On the other hand, all persons dealing with banking companies must take notice—they are bound to be aware—of the limitations imposed by the deed of settlement, or by any statute, upon the directors as regards their powers; but not bound to more than to be aware of these limitations; they are not bound to draw any but direct or obvious inferences from the provisions they find there. (k)

Winding up and Bankruptcy.—The winding-up acts may be applied to the settlement of the affairs of joint stock banking companies generally; (l) also upon the company committing an act of bankruptcy, as [*600] defined in 7 & 8 Vict. c. 111, *s. 4, or upon a proceeding by a creditor, and an act of bankruptcy, as defined in s. 7, a *fiat* in bankruptcy may issue against such company. Also, prosecutions may be instituted in certain cases, indicated in s. 27, against directors or other officers of the company whose conduct may call for it.

A petition for winding up the affairs of one of these bodies is not to be refused on the ground, merely, that there are no debts due from the

(h) *Ex parte Chippendale*, 4 De G., M. & G. 19; *Burmester v. Norris*, 6 Exch. 796. As to security of post obit bond, mortgage of reversionary interest, &c., *Hawker v. Hallewell*, 25 L. J., Chanc. 558.

(i) *Royal British Bank v. Turquand*, 24 L. J., Q. B. 327; affirmed 25 L. J., Q. B. 317; see as to powers and duties of directors, 7 & 8 Vict. c. 110, s. 27.

(k) S. C., 25 L. J., Q. B. 318.

(l) See 7 & 8 Vict. c. 111; 11 & 12 Vict. c. 45; 12 & 13 Vict. c. 108.

company; in other words, a company may be wound up that is not actually indebted.(m)

Also, it is no objection to such a petition, to show that it is preferred by one of the directors, against whom a suit in Chancery is pending, seeking to make them personally liable for the losses of the company.(n)

Public Officer.—A public officer of a banking company, declaring “as public officer, according to 7 Geo. IV. c. 46 and 7 & 8 Vict. c. 113, s. 47,”(n) but, in truth, suing under the latter act, being one of the registered public officers of the Commercial Bank of London, dies after issue joined. The *Nisi Prius* record was made up from the plea roll, as though he were alive; the *venire* was awarded as between him and the defendants; no entry was made on the plea roll of his death, or of the appointment of another officer; but after the *Nisi Prius* record was made up, a memorandum was entered upon it, stating the death, and that another public officer of the company had been appointed to continue the proceedings; this was not stated by way of suggestion to the court, nor was it followed by any statement of confession by the defendants, or a *nient dedire*; and afterwards, the cause was entered by the name of the new officer as plaintiff, *versus* the defendants; and tried by a jury who had been returned to try a cause in which the deceased public officer was plaintiff; and it was held, that the trial was *irregular and unauthorized, the company would not be bound by a judgment in favour of the defendants, unless the plaintiff was their public officer; therefore, it was material who was on the record as plaintiff; if the party suing were not public officer, that would be a full defence, and the court considered that a suggestion of the death was indispensable.(o)

In equity, it is considered, as there is no change of interest, to be unnecessary to file any supplemental bill, in order to make a new registered public officer party to the suit.(p)

Prosecutions of Officers of the Bank.—As to the criminal liability of persons connected with joint stock banks, the following is the state of the law at present:—Early in the reign of the Queen, an act was passed to amend the law relative to legal proceedings, by and against members of banking companies;(q) but this statute only embraced proceedings at law and in equity. In the 4th year of Victoria, an act extending the provisions of the former was passed, making liable to prosecution, in the name of the public officer of the company, any member of the company, for frauds, &c., committed with respect to the property of the company; thus,(r) if any person or persons, being a member or members of (any joint stock bank,) shall steal or embezzle any money, goods, effects, bills, notes, securities, or other property of, or belonging to, any such joint stock bank, or shall commit any fraud, forgery, crime, or offence against,

(m) *In re St. Marylebone Banking Company*, 1 De G. & S. 585; affirmed 1 Hall & Tw. 100.

(n) See *supra*, p. 475.

(o) *Barnewall v. Sutherland*, 9 C. B. 380.

(p) *Butchart v. Dresser*, 18 L. J., Chanc. 198; 10 Hare, 453, S. C.

(q) 1 & 2 Vict. c. 96.

(r) 3 & 4 Vict. c. 111, s. 2; made perpetual, 5 & 6 Vict. c. 85.

or with intent to injure or defraud, any such joint stock bank, such member or members shall be liable to indictment, information, prosecution, or other proceeding, in the name of any of the officers, for the time being, of any such joint stock bank, (in whose name any action or suit [*602] might be lawfully brought against any member or members of any such joint stock bank,) for every such fraud, forgery, crime, or offence, and may, thereupon, be lawfully convicted, as if such person or persons had not been, or was, or were, a member or members of such joint stock bank; any law, usage, or custom, to the contrary notwithstanding.

A conviction of larceny or embezzlement, is not objectionable, for the reason that the defendant is himself a shareholder in the company;(s) and, in such case, the property, &c., must be laid to be in the public officer of the company;(t) where the defendant is the public officer, it seems the property is to be laid in the company.

But a manager of a branch bank, who has authority to make advances, as part of the business of the concern, to customers, and being himself a customer, makes such advances to himself, unknown to the directors, without giving any security, it is said, cannot be convicted either of larceny or embezzlement.(u)

The principle of this decision must not, it is conceived, be assumed to be this: that the defendant having authority as manager, to make advances to customers generally, had authority to make advances, as manager, to himself, as customer, for this was not the real ground, it would appear, on which the case proceeded; the bank were covered by his bond (with sureties) given by him, on coming into his office of manager, against the amount which he had advanced to himself; and there were various circumstances, as his remaining in the neighbourhood after voluntarily stating the amount he had advanced to himself, until his arrest on the charge of larceny, &c. &c., all which together, left it impossible to say that, in this particular case, the charge of larceny or embezzlement could be maintained.

[*603] *The general ground—that a manager of a bank, inasmuch as he has authority to advance to customers, has authority to advance to himself as a customer, and therefore cannot be convicted of embezzlement, for surreptitiously appropriating the funds in the bank, by means of making advances to himself—seems to be untenable, standing alone, and without other circumstances elucidating and explaining the real character of the acts done. For the general rule of law is clear: *a man cannot do a valid act to himself*; thus, a bishop in his capacity, as he is bishop, cannot make a lease to himself, as he is John Stiles; the same person cannot be donor and donee; a man cannot pay to himself, or contract with himself.(x)

(s) Reg. v. Atkinson, C. & Mar. 525; 2 Mood. C. C. 278.

(t) Chapman v. Milvain, 5 Exch. 61; Welsby, Arch. Crim. Plead. and Evid. 35, 36, 12th edit.

(u) Reg. v. Evans, Glouc. Sum. As. 1856, cor. Wightman, J. The bank was a copartnership under 7 Geo. IV. c. 46.

(x) See Vin. Abr. title, Himself; per Pollock, C. B., 2 Exch. 597; Finch, Law,

Hence, if the directors *could* authorize the manager to do, what the law says cannot be done, at any rate it will not be *presumed*—it might be urged—that they have done so, in any case: and if not, the advance to himself is no better than an illegal appropriation, for which he is punishable; for it cannot have a legal effect; it is a nullity, which the directors could not waive.

In truth, the local manager of a branch bank is placed in a position, necessarily of so confidential a character, as to make it not unfrequent, as the experience of courts of justice shows, for directors to omit the proper means of scrutinizing his proceedings, and practically enforcing his responsibility. For instance, where a bank has various branches, with local managers at each, a managing director visits each once a quarter, and examines the quarterly balance sheet, which is made out against his visit, by the manager, aided by the cashier or chief clerk; cases which have been brought before the courts, demonstrate that, in general, by means of an understanding, or collusion between the two, a balance *sheet may be concocted, so as to keep the managing [*604] director, to almost any extent, in the dark, as to the real state of the business, unless he checks the balance sheet, by the ledger, &c., and insists upon seeing that securities for advances are, at least, forthcoming. What is the value of such securities must, at any rate, in the first instance, be judged of by the local manager, to whom directors allow the power of making advances at his own discretion.

The directors, whether of banking copartnerships, or of joint stock banks, probably would find it difficult to support the absolute delegation of their duty of guiding and conducting the business to a local manager; the shareholders might well allege, “we elected you, on the faith we put in your personal qualifications of prudence, caution, and integrity in the conduct of business; we relied on your judgment, to decide in what way the funds of the bank should be invested, what accomodation should be granted, and to whom, and on what securities: this is a personal trust, and a personal trust cannot be delegated.”

In such a case as that of the manager of the Tewkesbury Bank just mentioned, if loss were to accrue to a bank, from the imprudence or fraud of the local manager, for which it were shown that opportunity had been afforded, by the neglect of the managing director, he might possibly be held liable for the whole, to the shareholders.

Again, can directors authorize a local manager to lend the money of the bank at his, not their, discretion?

The shareholders appoint the directors, in consequence of the faith which they repose in their character for skill, and integrity; for vigilance, prudence, sagacity, experience in banking concerns, which the directors, as individuals, possess; it is a personal trust, and the shareholders have a right to expect and require that these personal qualities shall be exerted, not only to save them from loss, but to realize profits upon their capital subscribed into the concern.

19; Wood v. Mayor of London, 12 Mod. 669; Litt. s. 168; Wingate, Max. 168; Collinson v. Lister, 20 Beav. 356; per Tindal, C. J., 3 M. & Gra. 580; Prest. Shep. Touchstone, 212.

[*605] The customers lend their money to the bank, in consequence *also of the faith which they have in the above qualities of the directors, and in the confidence which those qualities inspire, that the deposits shall be so dealt with, as to be available at all times; this also is a personal trust.

The directors, therefore, are clothed with a double trust; and *delegatus non potest delegari*; hence, it seems, they cannot legally make over their duties to the discretion of any one.

If it be urged the directors might dispense with these rules, in favour of the manager; the answer is twofold; first, that they have actually done so in any case, cannot be implied or assumed, it must be proved; for it will never be assumed, that a person has actually done that which there is a doubt whether he can legally do at all; secondly, this is not a case within the maxim, *quilibet potest renunciare juri pro se introducto*; for that maxim applies to the case of persons who are dealing with their own property, or their own rights, or responsibilities only, which is not the case of directors.

On these grounds—and perhaps others might be added—it is submitted to be very difficult to support the proposition, that a manager of a branch bank cannot be made liable for larceny, for surreptitiously advancing to himself.

Besides the above cases, where criminal proceedings may be taken against directors, and other officers of joint stock banks, they may be proceeded against on the bankruptcy of the company, for misconduct, by prosecution, under 7 & 8 Vict. c. 111, s. 27.

Pass Book.—The course of banking business in London, makes the only general mode of stating and adjusting accounts between bankers and their customers residing in or near the metropolis, to be as follows, respectively :—

A book, called a *pass book*, is delivered by the bankers to the customer, in which, at the head of the first page, and *there only, the [*606] bankers, by the name of their firm, are described as the debtor, and the customer as the creditor in the account; on the debtor side are entered all sums paid to, or received by the bankers, on account of the customer, and on the credit side, all sums paid to him, or on his account, and the said entries being summed up at the bottom of each page, the amount of each, or the balance between them, is carried over to the next folio, without further mention of the names of the parties, until the book being full, it becomes necessary to deliver a fresh one to the customer. For the purpose of having the book made up by the bankers from their own books of account, the customer returns it to them from time to time, and the proper entries being made by them up to the day on which it is left for that purpose, they hand it again to the customer, who thereupon may examine it, and if there appears any error or omission, it is his business to send it back to be rectified; if he does not, his silence is regarded as an admission that the entries are correct; but no other settlement, statement, or delivery of accounts, or any other transaction, which can be regarded as the closing of an old, or opening of a new account, or as varying, renewing, or confirming, (in

respect of the persons, or the parties mutually dealing,) the credit given on either side, takes place in the ordinary course of business, unless when the name, or firm of one of the parties is altered, and a new account thereupon opened in the new name, or firm.

The course of business is the same between such bankers and their customers, resident at a distance from the metropolis, except that to avoid the inconveniences of sending and returning the pass book, accounts are, from time to time, made out by the bankers, and transmitted to the customer in the country, when required by him, containing the same entries as are made in the pass book, but with the names of the parties debtor and creditor at the head, and with the *balance struck at the foot of each account, and his silence, &c., is regarded as before. [*607]

Before the alteration of the usury laws, the usage of Liverpool was held to be good and valid, by which a balance was struck every quarter, and the account sent to the merchant, &c., and then the balance, if against the merchant, was made to carry interest for the next quarter, and so on. (y)

Under special circumstances, accounts between banker and customer are admitted in equity from the necessity of the case, and for the convenience of mankind, in favour of the party writing them; one species of such necessity is, where the party presenting such evidence, cannot, from the nature of things, produce evidence *aliunde*, in support of the point, which his own accounts are adduced to prove; but the court must, in all cases, have the means placed before it, of judging whether the special circumstances are sufficient to justify the admission of such accounts in the particular instance. One circumstance of this nature, would be the duty, opportunity, or practice of the opposite party, to examine, audit, &c., the accounts, &c. (a)

The pass book between a bank and a joint stock company is a good source of evidence, to show that the bank paid to the company, calls due from A.; (b) one of the plaintiffs (the banking partnership,) being treasurer of the company and A. a subscriber.

Credit^e given in a pass book binds the bankers; for by entering the sums to the customer's credit, they lead him to suppose that they had received them on his account; they *alter his situation, and therefore shall not be allowed to say, that the items had never [*608] been received, (c) unless they can clearly show that the entries were made by mistake. (d)

But this is subject to the proviso, that the entries in the pass book be

(y) See the custom of dealing, as found by the master, *Devaynes v. Noble*, 1 Meriv. 535, 536. In the case of lunatics, such silence is not presumably acquiescence; *Howard v. Digby*, 2 Cl. & F. 660.

(z) *Caliot v. Walker*, 2 Anstr. 495.

(a) *Symonds v. Gas Light, &c., Co.*, 11 Beav. 283.

(b) *Alexander v. Barker*, 2 Cro. & J. 135; see *Foster v. M'Mahon*, 11 Ir. Eq. R. 287; *Chalmers v. Bradley*, 1 Jac. & W. 65. But pass book not evidence that a given person was provisional director of an abandoned company, 16 C. B. 671.

(c) *Shaw v. Dartnall*, 6 B. & C. 57.

(d) *Shaw v. Picton*, 4 B. & C. 715.

properly made on each side of it; a pass book, with entries on one side only, is not evidence of a settled account between the bank and the customer, although the book is kept by the customer, without objection to the entries.(e)

On a plea of nonjoinder of a partner, the defendant's pass book may be evidence against the plaintiff, with whom it was kept, if credit be given in it to the defendant solely, in support of the plea.(f)

A cashier of a banking house, upon his examination as a witness in chancery, declared himself to have ascertained from the clearing book, kept by him in his own handwriting, that a certain sum of money was paid in notes of the Bank of England, numbered so and so respectively; the witness proceeding solely on his knowledge of the book, and of his own handwriting, and not from any independent recollection of the fact deposed to. This cannot be received as evidence of the fact deposed to, though it may furnish ground of further inquiry.(g)

The pass book commonly is sent with a servant, &c., who is employed to obtain money from, or to hand it into, the bank. It may be of service to persons having dealings with bankers, to be aware of the proper mode of proceeding, in case any one sent with money to their banker, appropriates the money.

Where there is nothing to show that the person intrusted intended, on receiving the money, to steal it; as, for instance, *if it appear, [*609] that he has conceived he was entitled to pay himself with it, on account of some claim, or demand, or debt, which he alleges against the sender, an action for money had and received may be brought by the sender against him, subject to any set-off, which he may succeed in establishing. Such action will, however, fail, if it be found by the jury at the trial, that he received the money, with the intention to steal it, and then feloniously converted it; and the defendant will have a verdict in the action, and the plaintiff will lose the costs, although the judge will, it is said, give directions, that the defendant shall be indicted for the felony upon the verdict.(h)

Manifestly, however, the proper proceeding in such case is, for the sender to commence by way of indictment.

Colonial Banks.—The Winding-up Acts may be applied to the settlement of the affairs of colonial banks, under certain circumstances; just as there can be no doubt, that it is possible, for a private banker, carrying on business in the colonies, to be made bankrupt in England: the following cases show this.

A banker in India, drawing bills upon bankers in England, against other bills sent thither, on which he got a profit, in the course of exchange; and in the progress of such transactions, contracting debts in England, may be made a bankrupt here, upon an act of bankruptcy committed by him in England, after he had quitted India.

(e) Ex parte Randleston, 2 Deac. & C. 534; see Boardman v. Jackson, 2 Ball & B. 382.

(f) Rotey v. Howard, 2 Stark. 555.

(g) Dupuy v. Truman, 2 Y. & Col. Ch. R. 341.

(h) Prosser v. Rowe, 2 Car. & P. 421; R. v. Joliffe, 4 T. R. 290, 293; 2 Hale, P. C. 151*; see 8 A. & E. 528, contra.

An assignment of all his effects, in trust for creditors, in certain proportions, executed by him, whilst resident in India, is not an act of bankruptcy, within the meaning of the bankrupt law. Nor is such assignment fraudulent and void in itself, being intended, bona fide, at the time of its *execution, and assented to, by the generality of the creditors.⁽ⁱ⁾ [*610]

The affairs of the Royal Bank of Australia were actually wound up in Chancery, under the Acts of 1848 and 1849; the petitioner for the winding-up order, a shareholder in the bank, being described in his petition, as of a place out of the jurisdiction, was ordered to give security for costs, before his petition could be heard; and proceedings taken in Scotland against the petitioner, in respect of a debt, due from the company, were held to furnish proper ground for winding up, on his petition.^(k)

But it does not at all follow, that the Courts of Chancery will wind up the affairs of Colonial Banks, under all circumstances: the following case gives a general outline of the rule which they follow in applying the winding up process to such institutions: beyond that general outline, the law does not yet appear to be developed; beyond it, therefore, no advice, for the guidance of persons who may be interested in such questions, can safely be offered.

The company called the Union Bank of Calcutta, was organized and established in India, as a joint stock company, in the year 1829, by persons, all of whom were then resident in India, for carrying on the business of banking at Calcutta. Its constitution was regulated by two deeds of partnership, dated the 1st August, 1829, and the 1st August, 1839. By the latter of these deeds, it was provided, that the business of the company should consist in issuing notes and bills of exchange, at the office, in Calcutta, and in discounting bills and promissory notes, and in all other branches of business, usual with bankers in Calcutta; and it was provided, that the capital stock of the company should be 10,000,000, of Company's rupees.

*By an Act of Legislature of Calcutta, passed in 1845, the Union Bank was authorized to sue, and be sued, in the name of [*611] its secretary; and it was declared that, upon any judgment against the secretary, execution might be issued, against any shareholder, upon motion made for that purpose, in open court; but it was provided, that that act should not extend to incorporate the Union Bank.

The partnership deeds of the bank were executed, at Calcutta, by the shareholders, and such deeds, as well as all the books, and accounts of the bank, and all transfers of shares in the bank, were always kept in the office of the bank there, and in the custody of the officers of the bank there.

The meetings of the shareholders were always held at Calcutta, and the affairs of the bank were entirely managed in India. The directors,

(i) *Ingliss v. Grant*, 5 T. R. 530; see *Alexander v. Vaughan*, Cowp. 398; *Ex parte Williamson*, 1 Atk. 82; see 22 L. J., Chanc. 276; 24 id. 621; plea of colonial judgment, *Bank of Australasia v. Harding*, 19 L. J., C. B. 345; S. C., 9 C. B. 661.

(k) *Ex parte Latta*, 3 De G. & S. 186.

trustees, secretary, treasurer, and all the other officers of the bank, were all resident at Calcutta.

The Union Bank carried on the business of bankers in Calcutta, to a large amount. In the course of business, it received, at the establishment, at Calcutta, sums of money, to the credit of persons in London, and paid the amounts accordingly in London, through Messrs. Glyn & Co., bankers, in Lombard-street; and similar payments were made to Messrs. Glyn & Co., in London, on account of the Union Bank, to be paid to persons, at Calcutta, which were accordingly paid: and the Union Bank drew and issued bills of exchange and promissory notes, and granted letters of credit, at Calcutta, upon Messrs. Glyn & Co., which were duly honoured, by the latter firm in London, as agents for the Union Bank: and Messrs. Glyn & Co., as agents for the Union Bank, issued similar notes on the Union Bank, which were duly honoured, at Calcutta. The Union Bank *received the usual banking profits* on all these transactions.

On a petition, for the usual order for winding up the affairs of the bank, it was alleged by the petitioner, a shareholder of the company, resident in England, that the banking house of Messrs. Glyn & Co. was [*612] constituted a place of *business for the Union Bank, and that, in this manner, the Union Bank carried on the business of bankers, in England.

The Union Bank suspended business in 1847, being greatly indebted in India, but having also large assets and liabilities, in England.

Upon the suspension of payment, an executive committee was formed, at Calcutta, for liquidating its debts, and a committee of creditors was also formed, by whom a scheme of contribution, by shareholders, was framed, by which the shareholders were assessed, in sums varying from 25*l. per share*, to 200*l. per share*. Under this, the petitioner was assessed, for 200*l. per share*, on fifteen shares. He refused to pay; and an action at law was commenced, against him, by Messrs. Glyn & Co., for the recovery of 5,000*l. due to them*, from the Union Bank.

Shareholders in the bank, to the number of sixty and upwards, at the time of its suspension of payment, were resident in England.

There being no office, of the Union Bank of Calcutta, in England, except the banking house of Messrs. Glyn & Co., personal service of a copy of the petition was made on one of the partners, of that firm, at the banking house.

A member and contributory of the Union Bank, resident in London, was also served, with a copy of the petition, and with the order of the court, specially fixing the hearing of the petition.

The petition was advertised in six newspapers, at Calcutta, including the Calcutta Gazette, and also (as it appears) in the London Gazette.

The service on the contributory in England, and the advertisement in the London Gazette, were ruled to be sufficient, to satisfy the Winding-up Act, 1849, section 2.

On the above facts, Vice-Chancellor Knight Bruce said, he assumed, (without however deciding,) that, according to the true construction of the Winding-up Acts, the court had power to direct the winding up of

the company, so far as it could *be done in the absence, from the jurisdiction, of a large number of shareholders; but he also stated [*613] that it was not in every case, within the provisions of the acts, that the court would interfere under them; for he held it was incumbent on the court, not to act under those statutes, when there were judicial grounds for holding it not to be expedient to do so:—that is, (as it seems,) the court will not act, where it is not shown that there exist, in this country, the means of doing substantial justice, or more good than harm, by so interfering. But on the whole that he had heard, he was of opinion, that much more mischief would arise from acting on this petition, than from declining to interfere; and he left the petitioner to the remedies, which, by the laws of this country, or of India, or of both, were open to him, independently of the Winding-up Acts.(l)

*CHAPTER XVII.

[*614]

SAVINGS' BANKS.

A SAVINGS' Bank is defined to be any institution, in the nature of a bank, formed for the purpose of receiving deposits of money, for the benefit of the persons depositing, to accumulate the produce of so much thereof, as shall not be required by the depositors, their executors, or administrators, *at compound interest*, and to return the whole, or any part, of such deposit, and the produce thereof, to the depositors, their executors, or administrators—deducting out of such produce, so much as shall be required for the necessary expenses, attending the management of such institution—but deriving no benefit whatsoever from any such deposit or the produce thereof.(a)

The society or body of persons who have set on foot, and wish to establish and maintain, the institution, with the powers, privileges, and advantages, which the Savings' Banks Acts give to them, must cause the rules and regulations for the management of their institution to be

(l) *In re Union Bank of Calcutta*, (Watson's case,) 3 De G. & S. 253. Every banking company of more than six persons, carrying on business in England is made, by s. 48 of 7 & 8 Vict. c. 113, a trading company within the Winding-up Act of 1844, (7 & 8 Vict. c. 111;) but, N. B., by 11 & 12 Vict. c. 45, s. 6, in case any petition for adjudication, &c., shall have been granted against any company under 7 & 8 Vict. c. 111, no petition for winding up shall be presented by any other person than by the creditors' assignee of the estate, &c., of the company, who by order of the court of bankruptcy, but not otherwise, may present a petition for an order for winding up. See further on this subject, *Brettell v. Davis*, 7 Exch. 307; *In re Warwick, &c., Railway Company*, 5 De G., M. & G. 495, 499; *In re Norwich Yarn Company*, 5 De G., M. & G. 505; S. C., 13 Beav. 426; *Prescott v. Hadow*, 5 Exch. 726; *Beardshaw v. Lord Lonsborough*, 11 C. B. 498; *Hill v. London, &c., Assurance Company*, 28 L. T. 67, and the Case of the Royal British Bank now, (Nov. 1856.) sub judice.

(a) 9 Geo. IV. c. 92, s. 2. See proviso there as to sanction of Quarter Sessions, &c. Deposit of rules with clerk of peace abrogated by 7 & 8 Vict. c. 83, s. 18.

entered, deposited, and filed in particular modes, to be found detailed and specified in the statutes; (b) when they will become entitled to those powers, &c. (a)

Deposits.—No person can be admitted as a depositor for the first time, without making a disclosure of the name, profession, business, occupation, calling and residence of such person. (c)

[*615] *Further, such person must, at such first time, and as often as required by the trustees, or managers, make and sign a declaration, of not being entitled to any deposit or benefit from any other savings' bank: and this under pain of forfeiting such other deposit, &c.: such declaration to be filed and kept by the trustees; a printed notice of the regulation to this effect being affixed in the bank; and a copy of the declaration, with the penalty, annexed to, or printed at the beginning of, the deposit book. (d)

No one can deposit more than 30*l.* in any one year, exclusive of compound interest. (e)

Moreover, deposits cannot be received, from any depositor, so as to make the sum, which he shall be entitled to, exceed 150*l.* on the whole. (e)

Also, although a depositor's money may go on increasing, at compound interest, until it reaches the amount of 200*l.* in the whole, yet, thenceforth, no interest shall be payable on such deposit, so long as it remains at that amount. (e)

Attempts at evasion of the statute, in this respect, by taking advantage of the clauses, enabling persons to deposit money in trust for others, will be treated as follows:—

A., after depositing in his own name, in a savings' bank, to the full extent allowed, made further deposits to another account in the name of himself and his sister, but nominally as trustee for her, in this form:—“Henry Field, in trust for Ann Field,” making a declaration accordingly. It appeared, on examination, that the statute, whilst allowing one person to deposit money in trust for another person, in their joint names, still left him at liberty to withdraw it, without any communication with that person.

A court of equity, considering that the second account had been opened only with a view of evading the statute, *and not with [*616] the intention of creating a trust, in favour of the sister, refused to declare her to be entitled to the sum deposited to the second account. (ee)

In case a married woman puts money in the bank, or a woman, who afterwards marries, does so, in either case the trustees or managers may pay out the whole, or any part, to her, unless the husband shall give

(b) See 9 Geo. IV. c. 92, ss. 3, 4, 5.

(a) See note (a), preceding page.

(c) 7 & 8 Vict. c. 83, s. 3; 3 & 4 Will. IV. c. 14, s. 29.

(d) 9 Geo. IV. c. 92, s. 34; and 7 & 8 Vict. c. 83, s. 3.

(e) 9 Geo. IV. c. 92, s. 35; and see s. 37. Withdrawing deposits to place in another savings' bank, s. 39. Death of depositor, having 50*l.* in bank, ss. 40, 41, 42, 43.

(ee) Field v. Lonsdale, 13 Beav. 78.

them notice in writing of the marriage, and requiring payment to be made to him.^(f)

Deposits may be received from the officers of certain Friendly Societies, duly constituted according to law, without restriction as to amount,^(g) and from the trustees, &c., of any charitable or provident institution, or charitable donation or bequest, for the maintenance, education, or benefit of the poor, to the extent of 100*l.* per annum, and of 300*l.* in the whole, exclusive of interest;^(h) but funds of benefit building societies are not allowed to be invested in savings' banks.⁽ⁱ⁾

Annuities.—Depositors in savings' banks are enabled to purchase annuities of not less than one, nor more than thirty pounds each; the provisions and regulations respecting these are extremely numerous, and the reader must be referred for them to the statute, which contains all that has been prescribed by the legislature respecting this subject.^(k)

Deposit Book.—By the rules of a savings' bank, entries of deposits were to be made in a book kept by the bank for the purpose, and also in a duplicate account book to be kept *by the depositor, which duplicate was to be a voucher for the party producing it, and a receipt for the bank, when it was handed over to them. Then A. deposited in the name of B. a sum with the bank, and afterwards, without B.'s authority, got back the money, and delivered up to the bank the duplicate account book. [*617]

Nevertheless, B., it was held, still continued a depositor;^(l) showing the bank to be liable for having allowed B.'s money to be drawn out without B.'s license.

Provision must be made in the rules of all savings' banks for every depositor, once a year at least, causing his deposit book to be produced at the bank for the purpose of being examined.^(m)

Remedies of Depositors.—Any dispute arising between the trustees and managers, and any individual depositor, &c., or any person claiming to be entitled to any deposit, is to be referred, in writing, to the barrister at law, appointed under the Savings' Banks, &c., Acts, and his award is to be final; the submission and award to be free of stamp duty.⁽ⁿ⁾

Now, the effect of this clause is probably the same as was repeatedly held to be that of the provision for reference under a former statute; viz., that no action is maintainable by depositors against trustees or managers, to recover their deposits; they must have recourse to the mode of reference to the barrister.^(o)

(f) 7 & 8 Vict. c. 83, s. 12.

(g) 17 & 18 Vict. c. 50, s. 2. This does not include the Friendly Societies under 17 & 18 Vict. 56, s. 8. See also 18 & 19 Vict. c. 63, ss. 32, 33, 36; and see first sched. repealing 17 & 18 Vict. c. 50, s. 2.

(i) 6 & 7 Will. IV. c. 32, s. 6.

(h) 9 Geo. IV. c. 92, s. 27.

(k) 16 & 17 Vict. c. 45.

(l) *R. v. Cheadle Savings' Bank*, 1 A. & E. 323.

(m) 7 & 8 Vict. c. 83, s. 5.

(n) 7 & 8 Vict. c. 83, s. 14. He may inspect books and administer oath, *id.* s. 15. He may proceed *ex parte* on sending notice, &c., *id.* s. 14; see *Lynch v. Fitzgerald*, 15 Law Times, 372.

(o) See 8 Bing. 394; 6 A. & E. 952; 21 L. J., Q. B. 169.

So that, even where the money of a depositor has been embezzled, it seems he would not, under most circumstances, at any rate, have a right of action against the trustees; (*p*) but, perhaps, as trustees and [*618] managers are now made *personally liable for moneys actually received and not paid over by them, &c., there might be room to contend, that an action would lie in favour of the depositor, whose money had been so received, &c.; but the not paying over, at the next day on which the bank is open, by any person holding any situation or appointment in a savings' bank, is a misdemeanour, for which such persons are criminally responsible. (*q*)

Investments.—The trustees are to pay into the Bank of England all sums to be invested, that is to say, all the deposits they receive, except such sums, as from time to time, it is incumbent on them to keep in hand, to answer the exigencies of the savings' bank; and they are not to invest in any other security; (*r*) and all moneys so paid into the Bank of England, are to be invested, from time to time, in bank annuities or exchequer bills, and the interest, as it becomes due thereon, is to be invested in government annuities or exchequer bills. (*s*)

Annual Accounts.—The trustees, or managers, are annually to prepare a general statement of the funds of the savings' bank, invested in the Bank of England, showing the balance due to all the depositors, the expenses incurred, and stating in whose hands the balance shall then be, with other particulars, (for which reference must be made to the statutes themselves,) every depositor being entitled to a printed copy on payment of one penny. (*t*)

Officers.—Every treasurer, actuary, or cashier, having receipt or custody of money subscribed or deposited for the *purpose of the [*619] bank, or any interest or dividend from time to time accruing therefrom; and every officer receiving salary or allowance, must give security, by bond, to the clerk of the peace, or town clerk, &c., free of stamp duty, (*u*) to be transmitted for custody to the commissioners of the national debt. (*x*)

Besides the security of the bond, savings' bank depositors have this further security given by later enactments, under which they are entitled, in case of the bankruptcy of an officer with funds belonging to the bank in his hands, to have the money due to the bank replaced, in full, out of his estate, before any other creditors are paid anything. The following decisions illustrate this:—

A draper was appointed actuary and cashier of a savings' bank, a rule of which was, that one or more members of the committee should attend at the cashier's shop to receive the deposits; this, however, was not

(*p*) See *R. v. Mildenhall, &c.*, 6 A. & E. 952.

(*q*) 7 & 8 Vict. c. 83, s. 5.

(*r*) 9 Geo. IV. c. 92, s. 11; see ss. 12, 13.

(*s*) 9 Geo. IV. c. 92, s. 15.

(*t*) 9 Geo. IV. c. 92, ss. 46, 47; and see s. 48. As to computation and rate of interest, 9 Geo. IV. c. 92, s. 49; 7 & 8 Vict. c. 83, ss. 1, 2, 10.

(*u*) 9 Geo. IV. c. 92, s. 7.

(*x*) 7 & 8 Vict. c. 83, s. 16, and as to delivery up to be cancelled.

attended to, and the cashier was permitted to receive the deposits. He became bankrupt, and the deposits were held not to be "moneys in his hands by virtue of his office," so as to be claimable in full by the savings' bank, under 3 & 4 Will. IV. c. 14, s. 28.

That enactment is to this effect:—If any person appointed to any office in a savings' bank, and having in his hands or possession by virtue of said office or employment, any moneys belonging to such savings' bank, shall become bankrupt, his assignees shall pay out of his assets all such sums before any other debts are paid.

But the provision being against common right, must be construed strictly: then the duty of the office of actuary did not include the receipt of money, which duty, by the rule above referred to, was attributed to one or more members of the committee; nor did the duty of cashier include the receipt of money for the same reason, and because the duty *of a cashier is to pay money; consequently the moneys were not in his hands at the time of the bankruptcy, *by virtue of his* [*620] *office*. The petition of the trustees of the savings' bank to be paid in full the 2,206*l.*, in which the draper was a defaulter, was accordingly dismissed with costs.(y)

It must be carefully observed, moreover, that the stat. 3 & 4 Will. IV. c. 14, s. 28, only applies to savings' banks which have conformed to 9 Geo. IV. c. 92, s. 6, which prevents from having the benefit of the act any savings' bank, the rules of which do not provide that no person being treasurer, trustee, or manager of such institution, or having any control in the management thereof, shall derive any benefit from the deposits in the bank, except, &c.

It is proper also to notice, that the certificate of the barrister of conformity to 9 Geo. IV. c. 92, is not conclusive proof in this respect.(z)

In case then of the bankruptcy of any person in office in a savings' bank, the savings' bank can only be paid in full his debt to them, when they have conformed in all respects to the stat. 9 Geo. IV. c. 92, and there has been no negligence or laches on the part of the manager or committee, &c., of the institution.

The rule to be attended to in such applications is this—the savings' bank claims a privilege against common right—viz. the privilege of priority to all other creditors; they must therefore clearly bring themselves within the language of the enactments which confer that privilege.

Where a person, on his appointment as treasurer of a savings' bank, enters into the usual bond, &c., but does not actually receive any money, the deposits being paid by the managers directly into a bank, of which he is a partner, to *the credit of the trustees of the savings' [*621] bank, who are allowed interest on it, but he signs the monthly return to the National Debt Office, thereby acknowledging the balance,

(y) Ex parte Fleet, 4 De G. & S. 52; The Dartford Savings' Bank, see 1 Fonbl. Bank. R. 137; 7 & 8 Vict. c. 83, s. 5. The bankers of a Friendly Society are not officers, so as on their bankruptcy to entitle the society to be repaid in full. Ex parte Harris, De G. Bank. R. 162.

(z) Ex parte Haynes, 3 M., D. & De G. 663; S. C., what is sufficient compliance: see Ex parte Whipham, 3 M., D. & De G. 564.

&c., to be in his hands as treasurer. On the bankruptcy of the bank, the savings' bank recovered in full.(a)

But it is not only in case of bankruptcy of their officer, &c., that the savings' bank is entitled to have *sums of money* owing by him replaced in full, in priority to other creditors, but further, whenever any officer, intrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his office or employment, any money or effects of the bank, or any deeds or securities relating thereto, dies or becomes bankrupt, or insolvent, or has any execution, or attachment, or other process issued against his lands, goods, chattels, or effects, or makes any assignment thereof for the benefit of his creditors,—then his executors, administrators, or assignees, or other persons having legal right, according to the case, or the sheriff or officer executing the process above referred to, must, within forty days after demand, made by two of the trustees, deliver and pay over all money and other things belonging to the bank, and pay out of the estate, &c., all money remaining due, which such officer received by virtue of his said office or employment, before any other of his debts are paid or satisfied, or before the money directed to be levied by the above process is paid over to the party issuing it.(b)

So that in an administration suit the courts of equity, on petition, have ordered the payment of money due to the savings' bank, before any report made, but would not order the payment of the costs of the petition.(c)

The clerk in a savings' bank may be indicted for embezzlement of [*622] money, that he has received from a depositor and *appropriated, and he will be properly described as clerk to the trustees, although he is elected annually by ballot, at a meeting of the managers,(d) and it seems that such indictment might be supported against a clerk to a savings' bank, equally as in the case of a clerk to a private bank, by proof of a general deficiency of moneys that ought to be forthcoming, without showing any particular sum received, and not accounted for.(e)

Trustees.—All the effects whatever, and all rights and claims belonging to the bank, are vested in the trustees for the time being, without a fresh assignment being necessary on the death or removal, &c., of any one or more of them;(f) so that they are somewhat in the nature of a corporate body.

No trustee or manager can be made personally liable, except for his own acts and deeds: he cannot be made personally liable, for anything done by him, in virtue of his office, in execution of stat. 9 Geo. IV. c. 92, except in cases where he is guilty of wilful neglect or default.(g)

(a) Ex parte Riddell, 3 M., D. & De G. 80; see Ex parte Ray, 3 Deac. 537.

(b) 3 & 4 Will. IV. c. 14, s. 28.

(c) Hatch v. Lee, 10 L. J., Ch. 223.

(d) R. v. Jenson, Ry. & Moo. 434; see the rules cited there; see also Reg. v. Miller, 2 Mood. Cro. C. 249.

(e) R. v. Grove, Ry. & M. 447; decided by eight against seven judges; in general, a man cannot be convicted of *stealing* a mere *balance*. Further as to prosecuting clerk, Reg. v. Taffs, 4 Cox, C. C. 169.

(f) 9 Geo. IV. c. 92, s. 8.

(g) Id., s. 9.

No trustee or manager is liable to make good any deficiency arising in the funds, unless he shall have deposited, with the Commissioners for the Reduction of the National Debt, a written declaration signed, of his willingness so to be answerable; and he may limit his responsibility to such amount, as he may specify therein.^(h)

Nevertheless, every trustee and manager is personally responsible and liable, for all moneys actually received by him, on account of or for the use of the bank, and not paid over or disposed of, according to the rules.^(h)

*All the officers may be called upon, and are bound to account and deliver up when duly called upon, all effects, &c., belonging to the bank in their hands, by order of not less than two trustees and three managers, or at any general meeting of the trustees or managers: on default, the trustees may exhibit a petition to the Quarter Sessions, who may proceed in a summary way, and make such order upon hearing all parties concerned, as they shall think just; such order to be final.⁽ⁱ⁾

For other points of minor importance, the reader is referred to the various statutes respecting savings' banks.^(k)

The legislature has provided, by special measures, for the establishment of military savings' banks, which are exempted from the operation of the previous enactments respecting savings' banks in general:^(l) and, in another statute, for the establishment of savings' banks for seamen, (the deposits not to exceed 150*l.* in the whole, in respect of any one account,) which *are* subjected, except as to the amount, to the operation of the previous enactments respecting savings' banks in general.^(m)

Various points respecting questions arising on the relations of bankers to savings' banks, to whom they act as treasurers, &c., have been already discussed,⁽ⁿ⁾ and need not be again treated.

^(h) 7 & 8 Vict. c. 83, s. 6.

⁽ⁱ⁾ 9 Geo. IV. c. 92, s. 10.

^(k) Exemptions from stamps and other duties in favour of savings' banks, 9 Geo. IV. c. 92, ss. 5, 40, 44; 3 & 4 Will. IV. c. 14, s. 19; 7 & 8 Vict. c. 83; from income tax, 5 & 6 Vict. c. 35, s. 88.

^(l) 5 & 6 Vict. c. 71, see s. 6; 8 & 9 Vict. c. 27, see s. 6; 12 & 13 Vict. c. 71.

^(m) 17 & 18 Vict. c. 104, s. 180.

⁽ⁿ⁾ See *supra*, pp. 344, n., 345.

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